TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 738.

WAGNER ELECTRIC COMPANY, APPELLANT,

vs.

LAMAR LYNDON AND CHARLES E. MOHRSTADT, SHERIFF OF THE CITY OF ST. LOUIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED DECEMBER 16, 1922.

(29,288)

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DD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 13, 1923.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1922, of said Court, before the Honorable John E. Carland, Circuit Judge, and the Honorable Jacob Trieber and the Honorable Thomas C. Munger, District Judges.

Attest: [Seal of United States Circuit Court of Appeals, Eighth Circuit.] E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fifteenth day of December, A. D. 1921, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Wagner Electric Manufacturing Company was Appellant, and Lamar Lyndon, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Citation and Acknowledgment of Service.)

The United States of America, to Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis,—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Wagner Electric Manufacturing Company is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable C. B. Faris, Judge of the Circuit Courts of the United States for the Eastern District of Missouri, this 12th day of October in the year of our Lord one thousand nine hundred and twenty-one.

C. B. FARIS,
United States District Judge,
For the Eastern District of
Missouri.

Service of a copy of the above is hereby acknowledged this 24 day of October, 1921.

CLARENCE T. CASE,
Attorney for defendant Charles
E. Mohrstadt, Sheriff etc.

2 United States of America
Eastern Division of the Eastern
Judicial District of Missouri—ss.

Be It Remembered, that heretofore, to-wit: on the 8th day of June, A. D. 1921, there was filed in the office of the Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri, a bill of complaint wherein Wagner Electric Manufacturing Company, a corporation, is Plaintiff, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, are defendants, which bill is in words and figures as follows, to-wit:

Petition.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Wagner Electric Manufacturing Company, a corporation, Plaintiff,

vs.

Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, Defendants.

1. Plaintiff is a corporation organized, existing and doing business under the laws of the State of Missouri, with its principal place of business in the City of St. Louis, State of Missouri, and in the Eastern Division of the Eastern District of Missouri, of which said state, and of no other, it is a citizen, and of which said division and district it is a resident.

2. The defendant Lamar Lyndon is a citizen and resident of the State of New York(and is not a citizen of and does not reside within the State of Missouri.

3. The defendant Charles E. Mohrstadt is a citizen
3 and resident of the State of Missouri and of the Eastern Division of the Eastern District thereof.

4. This is a suit of a civil nature, brought for the purpose of establishing a trust in plaintiff's favor in and to a certain fund of $15,015.29, now in the possession of defendant Charles E. Mohrstadt, Sheriff as aforesaid, and in and to which the defendant Lamar Lyndon claims an interest, and to enjoin the delivery of said fund to the defendant Lyndon, and to require the payment of said fund to the plaintiff herein, which said fund was coerced and taken from the plaintiff herein

through and under a certain judgment made and entered by the Circuit Court of the City of St. Louis, Missouri, on the 4th day of December, 1917 against the plaintiff herein and in favor of the defendant Lamar Lyndon, and in and through an execution issued by the Circuit Court of the City of St. Louis, Missouri, under said judgment, directed to the defendant Charles E. Mohrstadt, as Sheriff, which said judgment was so made and entered, and which said execution was so executed against the plaintiff herein in violation of those provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which prohibit the states from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

5. Plaintiff states that heretofore, to-wit, on the 10th day of May, 1917 defendant Lamar Lyndon instituted a suit against plaintiff in the Circuit Court of the City of St. Louis, Missouri, by filling therein a petition in word and figures as follows:

"Comes now the plaintiff and states that the defendant, Wagner Electric Manufacturing Company, is a corporation organized and existing under and by virtue of the laws of the State of Missouri, having its principal office in the City of St. Louis and State of Missouri.

For his cause of action plaintiff states that he is the original and sole inventor of certain improvements in Devices for Recharging the Storage Batteries of Automobiles; that on the 20th day of April, 1906, letters patent of the Unitel States No. 815,360 was issued to him wherein and whereby there was granted to him, his heirs, and [and] assigns, for the
4 full term of seventeen years from said date, the exclusive right to make, use and vend the invention disclosed and claimed in said letters patent; that he continued to be and was the owner of said letters patent on the 2nd day of March, 1912, and was on said date in sole enjoyment of all rights, granted under said letters patent; that on the 2nd day of March, 1912, the plaintiff and defendant entered into an agreement in writing wherein and whereby the defendant was granted and obtained the right to elect between the privilege of purchasing outright the patent hereinbefore referred to, or operating thereunder under an exclusive license.

That the defendant in and by said contract agreed in the event that it elected to operate under an exclusive license, to pay for the third year thereafter, commencing March 2, 1914, and each year thereafter, for the rights under said patent a minimum royalty of $3,000.00 per year, said royalty to be paid in advance one-half in January and the remaining one-half in July of each year, respectively; that thereafter defendant, pursuant to the terms of said contract elected to operate under an exclusive license and that in pursuance of said contract the plaintiff by an instrument in writing dated, executed and delivered to defendant on the 16th day of April, 1912, assigned and tranferred to the defendant all the right, title and interest in and to the letters patent above referred to, subject to the payment of royalty provided by said contract, the same to be held and enjoyed by the defendant as fully and entirely as the same would have been held and enjoyed by the plaintiff had the assignment and license not been made; that the defendant caused said instrument to be recorded in the Patent Office of the United States on the 22nd day of April, 1912 in Book N. 89, at page 303; that in and by said instrument the defendant was vested with the entire legal and equitable title to the letters patent aforesaid and to the exclusive right to make, use and vend the invention covered by said letters patent, and that the plaintiff has been deprived of any rights under and by virtue of said patent; that the defendant has continued to hold and does now hold the full enjoyment of all rights under and by virtue of said patent, and has excluded plaintiff from any possession or enjoyment thereof whatsoever.

That under and by virtue of the contract of March 2, 1912, above referred to, the defendant became indebted to the plaintiff on account of a minimum royalty or license fee on January 1, 1914, in the sum of One Thousand Five Hundred Dollars ($1,500.00); on July 1st, 1914, in the sum of One Thousand Five Hundred Dollars ($1,500.00); on January 1, 1915, in the sum of One Thousand Five Hundred Dollars ($1,500.00); on July 1, 1915, in the sum of One Thousand Five Hundred Dollars ($1,500.00); on January 1, 1916 in the sum of One Thousand Five Hundred Dollars ($1,500.00); on July 1, 1916, in the sum of One Thousand Five Hundred Dollars ($1,500.00) and on January 1, 1917, in the sum of One Thousand Five Hundred Dollars ($1,500.00), making a total indebtedness of

Ten Thousand Five Hundred Dollars ($10,500.00) due and payable, at the commencement of this action.

That the plaintiff has fully complied with the terms of the contract on his part and that he has demanded the payment of the royalty due under said contract, but that no part thereof has been paid.

Wherefore, Plaintiff prays judgment against the defendant in the sum of Ten Thousand Five Hundred Dollars ($10,500.-00) with interest from the date that the installments thereof above set forth became due and payable, and for the costs of this action.

RIPPEY & KINGSLAND
Attorneys for Plaintiff."

Upon said petition a summons was issued to and served upon the plaintiff, and in due course plaintiff filed its answer to said petition, which said answer was in words and figures as follows:

"Comes now Wagner Electric Manufacturing Company a corporation, defendant in the above entitled cause, and for its answer to the petition filed by plaintiff in said cause denies each and every allegation in said petition contained.

And having fully answered, the defendant prays to be hence dismissed with its costs.

CHAS. A. HOUTS,
Attorney for Defendant."

And afterwards plaintiff filed an amended answer to said petition, which was in words and figures as follows:

"Comes now Wagner Electric Manufacturing Company, a corporation, defendant in the above entitled cause, and by leave of Court files this its amended answer to the petition herein, and for such answer denies each and every allegation in the petition contained.

Defendant further answering says that on or about the 9th day of November, 1912, defendant notified plaintiff in writing of its desire and decision to terminate the agreement between plaintiff and defendant, and thereafter, and from said date, defendant has claimed to plaintiff that said contract was at all times after said 9th day of November, 1912, terminated and no longer in force. On which claim plaintiff has, from time to time since that date, been duly informed.

Wherefore, having fully answered, defendant asks to be hence dismissed with its costs.

CHARLES A. HOUTS,
Attorney for Defendant."

In due time the defendant filed his reply to said amend-
6 ed answer in words and figures as follows:

"Comes now plaintiff in the above entitled cause and by leave of Court files this his reply to the amended answer of defendant, and for reply to the new matter set up in said amended answer denies each and every allegation thereof and prays for judgment in accordance with the prayer of the petition.

RIPPEY & KINGSLAND,
Attorneys for Plaintiff."

6. Plaintiff says that said petition, said answer and said reply were the only pleadings filed in said cause by the parties thereto; that they were in accordance with the Statutes of the State of Missouri prescribing the manner, method and form of instituting suits at law of the kind thereby instituted, and the procedure to be followed in defining the issues to be decided before a judgment could be entered for or against either of the parties to said cause; and that under the laws of the State of Missouri no issues, other than those raised by the pleadings, could be considered and determined by said Court in arriving at the judgment to be entered in said cause.

7. Plaintiff shows the Court that in and by said petition defendant Lyndon alleged and charged that plaintiff and defendant Lyndon had entered into a contract, whereby defendant Lyndon had granted unto plaintiff the right to elect between the privilege of purchasing outright a certain patent in said contract and in said petition described, or operating thereunder under an exclusive license; that plaintiff had elected to operate under an exclusive license, and had thereby become obligated to the defendant Lyndon for the payment of certain royalties, amounting to $10,500.00, which by said suit, defendant Lyndon sought to recover. Plaintiff by its answer aforesaid denied that it had elected to operate under an exclusive license, as alleged in the petition. And plaintiff shows the Court that under said petition and said answer thereto and
under the contract described in said petition, plaintiff
7 was not and could not be made liable for said royalties unless it had elected to operate under an exclusive

license, and that no judgment against plaintiff for said royalties could be entered without the court's first determining that plaintiff had elected to operate under such exclusive license.

8. Plaintiff shows the Court that in due course, after said pleadings had been filed, said cause came on for trial before said Court and a jury in Division Number 7 thereof, presided over at the time of said trial by Honorable Karl Kimmel, Circuit Judge; that at said trial both plaintiff and defendant Lamar Lyndon produced witnesses and other evidence, but that there was no evidence of any kind or description, which, either directly or by inference, tended to show that the plaintiff had elected to operate under a license, but, on the contrary, there was direct and positive evidence that plaintiff had not exercised its right of election at all. At the conclusion of the evidence, pursuant to the [pratices] of said Court, as described by the laws and Statutes of the State of Missouri, this plaintiff requested the Court to direct and instruct the jury as follows:

"The Court instructs the jury that under the contract the defendant was given the right to choose between purchasing the patent outright, or to operate under an exclusive license thereunder. If you believe and find from the evidence that the defendant did not elect either to purchase outright or to operate under an exclusive license, then your finding must be for the defendant."

Which instruction the Court refused to give, but, on the contrary, directed the jury as follows:

"The Court instructs the jury that under the contract sued on, defendant became bound to pay plaintiff for the third year, mentioned therein, namely, from March 2, 1914, to March 2, 1915, and each year thereafter, the sum of Three Thousand Dollars ($3000.00) per year as royalty for the enjoyment of the rights under the patent mentioned in the contract, said royalty to be paid in advance, one-half in January and the balance in July of each year; that under the contract defendant's obligation to pay the royalty was absolute, unless at the expiration of two years from the date of the contract, namely, two years from March 2, 1912, defendant terminated the agreement in compliance with its terms.

8 You are further instructed that the defendant did not terminate the contract in the manner and within the

time specified therein. You will return your verdict, therefore, for plaintiff, in the sum of Ten Thousand Five Hundred Dollars ($10,500.00), with interest from the dates each installment became due, as set out in the plaintiff's petition, to-wit:

Interest at the rate of six per cent per annum on the following amounts:

On $1500 from January 1st, 1914 to date
On $1500 from July 1st, 1914, to date
On $1500 from January 1st, 1915, to date
On $1500 from July 1st, 1915 to date
On $1500 from January 1st, 1916, to date
On $1500 from July 1st, 1916, to date
On $1500 from January 1st, 1917, to date

Pursuant to said last mentioned instruction, the jury returned a verdict in favor of the defendant herein and against the plaintiff herein in the sum of $12,029.50. Thereupon, on said day, upon the coming in of said verdict, the Court entered judgment for said sum against this plaintiff and in favor of the defendant herein, which said judgment is in words and figures as follows:

"Now at this day come the parties hereto by their respective attorneys, and the plaintiff, by leave of Court, files a reply to the defendant's amended answer; and this cause coming on for hearing, comes also a jury, to-wit: "Chas. T. Bastian, Claude M. Beal, Homer L. Browning, Barnabus M. Cornwall, Hudson R. Darst, Richard W. Garrett, Chas. L. Godlove, Harry J. Harms, Augustine P. Healy, Harry A. Hoyt, Edw. F. W. Mueller, Ira Neil, twelve good and lawful men, duly elected, tried and sworn well and truly to try the issues herein joined, and a true verdict render according to the law and the evidence; thereupon the trial of this cause progressed, and being finished the jurors aforesaid, upon their oaths aforesaid, and under the instruction of the Court, returned the following verdict:

'We the jury in the above cause find in favor of the plaintiff, on the issues herein joined, and assess plaintiff's damages at the sum of Ten Thousand Five Hundred Dollars ($10,500.00) with interest from the dates each installment became due, to-wit:

Interest at the rate of six per cent per annum.

On $1,500 from January 1st, 1914, to date	$353.00
On $1,500 from July 1st, 1914, to date	308.50
On $1,500 from January 1st, 1915, to date	263.50
On $1,500 from July 1st, 1915, to date	218.50
9 On $1,500 from January 1st, 1916, to date	173.50
On $1,500 from July 1st, 1916, to date	128.50
On $1,500 from January 1st, 1917, to date	83.50
Total Interest	$1,529.50

C. L. GODLOVE,
Foreman.'

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant, the aggregate damages aforesaid assessed, to-wit, the sum of Twelve Thousand and Twenty-nine and 50/100 dollars ($12,029.50) together with costs of suit, and have therefor execution. Verdict and instructions filed."

Said judgment is entered in Book 318 at page 143 of the Judgment Records of the Circuit Court of the City of St. Louis, Missouri.

9. Plaintiff says that afterwards, in due time, and in accordance with the laws and practices obtaining in the State of Missouri, and the rules of said Court governing such matters, plaintiff filed its motion for a new trial, which was denied, and thereupon it duly perfected an appeal to the Supreme Court of the State of Missouri, by which Court said judgment was, on the 19th day of July, 1920, affirmed. A copy of the opinion affirming such judgment is attached hereto, marked "Exhibit A", and made a part hereof. That plaintiff thereafter filed its motion for a re-hearing in said last mentioned Court, and a motion to transfer said cause to court en banc, both of which said motions were denied; that plaintiff thereupon filed in the Supreme Court of the United States its petition for a writ of certiorari to review said judgment of affirmance, which said petition for certiorari was denied on the ..... day of 1921; and that plaintiff has exhausted its remedies at law.

10. Plaintiff shows the Court that neither the Circuit Court of the City of St. Louis, Missouri, which originally en-

tered said judgment, nor the Supreme Court of the State of Missouri which affirmed said judgment, considered or determined the question, whether or not this plaintiff had elected to operate under the patent refegred to under a license; that said courts were without jurisdiction or power to enter
10 said judgment, or any judgment against plaintiff in said cause without considering said question and determining that plaintiff had elected to operate under an exclusive license; and that the action of said Circuit Court of the City of St. Louis, Missouri, in directing the jury to return the verdict aforesaid, and in entering the judgment aforesaid, without determining said question, and the action of the Supreme Court in affirming said judgment without determining said question, were arbitrary, and plaintiff has thereby been denied the equal protection of the laws, and plaintiff, by being compelled, as herein described, to pay to the defendant Mohrstadt the said sum of $15,015.29 has thereby been deprived of its property without due process of law, and has been denied the equal protection of the laws, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States.

11. Plaintiff further shows to the Court that when its appeal from the judgment of the Circuit Court of the City of St. Louis, Missouri, to the Supreme Court of the State of Missouri was lodged in said last mentioned Court, said cause was, in accordance with the laws of Missouri and the rules governing said Court, assigned to Division No. 1 thereof, consisting at said time of Judges Woodson, Graves, Blair and Goode; that under the laws of Missouri, and the uniform practice of said Court, this plaintiff, as appellant in said Supreme Court of Missouri, was entitled to have said cause set down for a hearing and entitled to an oral argument upon the proposition of law and the facts pertinent to said cause, before all the judges of said Division No. 1 who should participate in the decision thereof; that under the Constitution and Laws of Missouri then, and now in force, a dissent by any judge sitting in a division of the Supreme Court entitles the losing party to have said cause transferred to the court en banc, consisting of all the judges of said Court, and to have a hearing
11 before all of the judges of said Court, and a decision of the cause by said Court en banc. Plaintiff states that when this said cause came on for hearing in Division No. 1 of the Supreme Court, Judge Woodson was absent and at no

time present at the hearing, and that said cause was argued orally before the other three judges of said division, but that notwithstanding the fact that Judge Woodson was absent, and as to him plaintiff had had no hearing, yet, nevertheless, Judge Woodson participated in deciding said cause, and wrote the opinion of the Court. Plaintiff states that within due time after the filing of the said opinion, written as aforesaid by Judge Woodson, plaintiff filed its motion for a re-hearing, and its motion to transfer said cause to Court en banc, asserting therein that through the participation of Judge Woodson in the decision of said cause, without plaintiff's having had a hearing before him upon the law and the facts involved in such decision, plaintiff had been deprived of its right to due process of law, and had been deprived of the equal protection of the laws guaranteed to plaintiff by the Fourteenth Amendment to the Constitution of the United States; and plaintiff says that by Judge Woodson's participation in the decision of said cause under the circumstances and conditions aforesaid, plaintiff was deprived of due process of law, and deprived of the equal protection of the law, contrary to Section Fourteen of the Amendments to the Constitution of the United States.

12. Plaintiff says that on the 2nd day of May, 1921 the defendant Lamar Lyndon, through his attorneys Messrs. John C. Rippey and L. C. Kingsland, co-partners under the firms name of Rippey & Kingsland, caused to be issued under the said judgment of the Circuit Court of the City of St. Louis, Missouri, an execution conforming to the laws and practices obtaining to such matters in the State of Missouri, which said execution was directed to the Sheriff of the City of St. Louis,
12 and commanded him of the goods and chattels of the plaintiff to make the amount of said judgment, namely, the sum of $12,029.50, interest and costs; that acting under said execution said Sheriff levied upon certain real estate in the City of St. Louis, Missouri, belonging to said plaintiff, of a value far in excess of the amount of said judgment, interest and costs, which at the time of said levy, amounted to the sum of $15,000.00, and that having so levied upon said real estate, said Sheriff proceeded to advertise said real estate for sale at public auction in the City of St. Louis, Missouri, the time of said sale being fixed by him on the 7th day of June, 1921; that in and for avoiding the sale of said property under said execution, plaintiff appealed to the District Court of the United States for the Eastern Division of the Eastern District of Missouri, which said court and juris-

diction of the subject matter and of the parties, for a temporary injunction, restraining the sale of said property until the plaintiff could have a hearing upon its claim as herein described; that said judgment was void for the reasons hereinabove set out, which said application for a temporary injunction was denied on the 6th day of June, 1921; whereupon, plaintiff to avoid the sale of its said property, and under protest, paid to the Sheriff of the City of St. Louis, Missouri, the amount of said judgment, interest and costs, as described in said execution, to-wit, the sum of $15,015.29, which said sum is now held by, and is in the possession of the defendant, Charles E. Mohrstadt, Sheriff as aforesaid, in the City of St. Louis, Missouri, within the Eastern Division of the Eastern District of Missouri.

13. Plaintiff shows the court that said fund, amounting as aforesaid to $15,015.29, was wrongfully taken from the plaintiff as herein described, and in equity and good conscience belongs to the plaintiff, and should be returned to it; that said fund is now in the possession of the defendant Mohr-
13 stadt, and is in the City of St. Louis, Missouri, and in the Eastern Division of the Eastern District of Missouri; that the defendant Lyndon claims said fund as his property under and by virtue of the judgment aforesaid; and that defendant Mohrstadt will, unless restained by this court, pay said fund over to said defendant Lyndon, and said defendant Lyndon will remove the same from the jurisdiction of this court, and said sum will be wholly lost to the plaintiff.

14. Plaintiff states that it is informed and believes, and so alleges the fact to be, that the defendant Lyndon has not sufficient property from which plaintiff could recover any judgment which it might obtain against defendant Lyndon, by reason of anything defendant Lyndon has done or threatens to do, as hereinabove described; that plaintiff has made diligent search for defendant Lyndon, and while defendant Lyndon is a citizen of the State of New York, and that is the place of his residence, his present whereabouts are to plaintiff unknown, and plaintiff, is, therefore, unable to have personal service upon defendant Lyndon of any notice of the filing of this suit, and of plaintiff's application in this suit for injunctive relief against defendant Lyndon; that plaintiff has exhausted all of its remedies at law against defendant Lyndon, and that plaintiff is remediless except in a court of equity.

15. Plaintiff says that the matter in controversy herein, exclusive of interest and costs, exceeds the sum and value of $3,000.00.

16. Wherefore, the premises considered, plaintiff prays that a temporary injunction be issued herein, directed to the defendant Mohrstadt, restraining and enjoining him from paying said sum of money, or any part thereof, to defendant Lyndon, or to any one through him or on his order, and commanding him to retain said fund until the further order of this court; and that a temporary injunction also be is-
14 sued herein, directed to the defendant Lyndon, enjoining him from receiving, assigning or in any way disposing of said fund, or any part thereof, until the further order of this court; and that upon a final hearing, plaintiff be adjudged the owner of [an] entitled to receive said fund, and that defendants be directed to release all claims thereto; and for such other and further orders and decrees as to the court may seem proper.

ALBERT BLAIR
CHARLES A. HOUTS
THOMAS J. COLE
Attorneys for Plaintiff.

State of Missouri,
City of St. Louis,—ss.

Thomas J. Cole, being first duly sworn on his oath, says that he is one of the attorneys for the above named plaintiff, Wagner Electric Manufacturing Company; that he has personal knowledge of the matters and things in said petition referred to; that the facts therein stated are true; and that those matters and things stated upon information and belief, he believes to be true.

THOMAS J. COLE.

Subscribed and sworn to before me this 8th day of June, 1921.

My commission expires Oct. 5, 1924.

BOAZ B. WATKINS
Notary Public.

15 Statement.

In the Supreme Court of Missouri.

Division No. 1

October Term 1919.

Lamar Lyndon, Respondent,
No. 21135 v.
Wagner Electric Manufacturing Co., Appellant,

This suit was instituted by the plaintiff in the Circuit Court of the City of St. Louis against the defendant, to recover seven installments of $1500.00 each alleged to be due him as royalties under a lease or license dated March 2nd, 1912, executed by the plaintiff to defendant.

The trial resulted in a judgment for the plaintiff for the amounts sued for, plus interest, which amounted to $1529.50 each. After moving unsuccessfully for a new trial the defendant appealed the cause to this Court.

The facts of the case are substantially as follows:

The plaintiff was an electrical engineer of high standing in his profession, and as such was connected with the Edison Electric Co. of New York, and the defendant was a Missouri corporation organized and existing under the laws of this State, and was engaged in the manufacture and sale of electric motor appliances in the City of St. Louis. The plaintiff was the sole inventor and patentee of a certain system of propulsion and battery charging of electric vehicles, covered by United States patent issued to him, dated March 20, 1912, and numbered 815,360.

On March the 2nd, 1912, the patentee, the plaintiff, and defendant entered into the following contract or license, whereby the former authorized the latter to manufacture and sell the said device.

(Formal facts omitted).

"This agreement made this 2d day of March 1912, by and between Mr. Lamar Lyndon, a resident of New York City, party of the first part, hereinafter called "Lyndon", and the Wagner Electric Manufacturing Company, a corporation of Missouri, with principal offices in the City of St. Louis, Missouri, party of the second part, hereinafter called the "Company".

"Witnesseth: Whereas, said Lyndon is the inventor and owner of United States Letters Patent No. 815,360 of March 20, 1906, referring to system of propulsion and battery charging of electric vehicles; and whereas the Company desires to undertake the manufacture of the system involved in
16 said patent. Now, therefore, in consideration of the agreements hereinafter set forth, and the sum of $1.00 paid by the Company to said Lyndon, receipt of which is hereby acknowledged, the parties agree as follows:

'1. The said Lyndon agreed that the Company may elect between the privilege of purchase outright of the said patent or operating thereunder an exclusive license on the following terms:

'(a) Purchase outright. Within one year from the date that the Company offers for commercial sale an electric machine combining the functions of a driving motor for a vehicle and a converter for charging the battery of said vehicle from the alternating current source of supply, the Company may acquire full ownership and title to said patent upon the payment of Twelve thousand dollars ($12,000). If the Company does not exercise this privilege within said period of one year, the privilege of purchase shall continue indefinitely during the life of the said patent subject to the stipulation that $2000.00 shall be added to the purchase price for each period of six months thereafter or fraction thereof until the total price of purchase shall have attained the total sum of $24,000.00, at which sum of $24,000.00 the price shall continue during the life of the patent. It is especially agreed that the purchase price shall be reduced by the amount of any sums paid to said Lyndon in [royalties] or otherwise.

'(b) Royalties. It is agreed that the Company is manufacturing at this time three standard sizes of direct current motors for driving electric vehicles, rated at 12, 14 and 16, respectively. Should the Company not elect to purchase outright, as provided in clause 'A' above, it may operate as an exclusive licensee under said patent hereinbefore referred to on the basis of a royalty of $4, $5, and $6 per machine, respectively, for machines built under said patent and delivering as motors as output equivalent to the said 12, 14 and 16 frames. If the Company shall developed additional sizes of equipment, it is agreed that a royalty per machine shall be arrived at for each machine fairly in proportion to the royalties stipulated for the frames mentioned in this paragraph.

'2. It is agreed that the company shall have a interval of approximately 30 days to investigate the validity of said Patent 815,360. At the end of that time the Company shall pay Lyndon the cash sum of $750.00. It is the spirit of this paragraph that the Company will immediately and diligently make the investigation herein described, and if it does not receive it within the period of time described an extension of 10 days is hereby agreed to. At the end of seven months from the date of this agreement, the Company shall pay an additional cash sum of $1000.00; both of said sums of $750.00 and $1000.00, respectively, are paid irrespective of commercial development and in the nature of a cash sum in consideration of this contract.

'3 It is mutually agreed that the Company shall not pay a minimum royalty during the first two years of this contract, but that for the third year under this agreement, assuming that the Company elects to operate under the exclusive license provisions in this contract, and for each year thereafter, the Company shall pay a minimum royalty of $3,000 per year. Said royalty to be paid in advance, half in January and the balance in July of each year, respectively.

17 '4. Should the Company elect to operate on the royalty plan, it is agreed that any royalties over and above the minimum provided for in paragraph 4 shall be paid to the said Lyndon semi-annually, as soon as the Company can reasonably make up accounts therefor. It is understood and agreed that accountings, either for minimums or for royalties in excess of minimums, shall be made and the sums due the said Lyndon paid within 30 days from the time stipulated in this agreement.

'5. It is the spirit and intent of this contract that the said Patent 815,360, is controlling in the art for the purpose covered by the claims thereof. If it should prove, in the course of time and the operations under this agreement that said patent is not controlling, then the Wagner Company may apply for a readjustment of the purpose price figures and royalties herein before stipulated. And it is agreed that such purchase price and royalties shall be pro-rated to a proper measure of the protection secured by the patents. If there should be any difference between the parties hereto in respect to proper rerating, the question shall be arbitrated in the usual manner.

'6. The Wagner Company undertakes to assume the cost of any patent litigation arising in connection with said patent. The said Lyndon agrees to co-operate with the Company in any litigation offensive, or defensive, in which the Company may become involved. There is nothing, however, in this contract which obligates the Company to engage in patent litigation unless it so elects.

'7. Improvements on this Patent. If the said Lyndon agrees to deliver to the Company by assignment in improvements he may make upon said patent 815,360 during the life of said principal patent. The Company, however, agrees to pay all costs of taking out United States Letters Patent of said improvements. The said Lyndon agrees that with respect to improvement patents provided for under this agreement, that the Company may also have the right to said improvements in territory under control of the United States, as the Philippine Islands, etc., the Company assuming to pay the costs of securing protection in such territory.

'8. If, at the expiration of two years from the date of this agreement, the Company desires to terminate the agreement, all rights conveyed hereunder to the Company by Lyndon are to revert to Lyndon and the Company hereby agrees to make such reassignment of said rights and patents; and further to furnish to said Lyndon a complete set of such drawings and designs as have been made by the Company for the construction of machine under said Patent No. 815,360.

In witness whereof, the parties hereto have fixed their names this 2nd day of March, 1912.'

"By paragraph three of the foregoing contract it was provided that after two years from its date, if the Wagner Electriet Manufacturing Company elected to operate under the exclusive license provisions of the contract, it should pay to Lyndon a minimum royalty of $3,000.00 per year; payable in semi-annual installments in January and July of each year. By this suit plaintiff seeks to recover seven such semi-annual installments alleged to have fallen due, commencing January 1, 1914, up to and including January 1, 1917, aggregating $10,500.00.

18 Plaintiff, to sustain the issues on his part, introduced in evidence, the contract above set out. He next intro-

duced in evidence an assignment to the defendant of the patent referred to in the contract, which assignment concluded with the following paragraph:

'This assignment is, however, made subject to the terms and conditions of the agreements made and entered into between me, my heirs and assigns, and the said Wagner Electric Manufacturing Company, its successors and assigns. Dated March 2, 1912, and April 12, 1912."

Plaintiff himself was the sole witness in his behalf. Upon the subject of whether or not the Wagner Electric Manufacing Company had availed itself of the right given it by the contract to elect to purchase or to elect to operate as a licensee, plaintiff himself testified:

'Mr. Kingsland (continuing): Q. Did the company avail itself of the privilege of purchasing the patent outright, or did they elect to proceed under the patent as a licensee?

Mr. Houts: I object to that as immaterial.

The Court: That is one of the things, whether they availed themselves of the privilege—

Mr. Kingsland: I will confine the question, therefore, as to whether the defendant Company availed themselves of the right to purchase outright.

The Court (addressing witness): You may answer that question.

To which ruling of the Court, the defendant, by its counsel, then and there duly excepted, and still continues to except.

The Witness: A. I never understood that it was the intention of the company to purchase outright.

Mr. Houts: I object to that and move that it be stricken out.

The Court: The objection is sustained, and the motion to strike out is sustained. (Addressing witness) You are asked whether or not they purchased this patent outright; you can answer by saying 'yes' or 'no'. Did they ever purchase this patent outright from you? A. I have never been sure, your Honor; they had the option of doing two things.

The Court: Q. Did you ever get $24,000 for this patent? A. Never; they never purchased it.

The Court: They never purchased it? A. No.

The Court: Q. What is the date of that assignment? A. April 12, 1912.'

On cross-examination the plaintiff testified that his patent had been issued to him in 1906; that no complete machine had ever been manufactured under the patent; that after the contract with the Wagner Company no machine had ever been built to his knowledge.

For the defendant, Mr. W. A. Layman, President of the Wagner Electric Manufacturing Company, was the only wit-
. He testified that he himself dictated the contract of
M. ch 2, 1912, in Mr. Lyndon's office. After the execution
of this contract, Mr. Layman returned to St. Louis and
19 started the construction of an experimental machine.
Prior to that date, so far as Mr. Layman was aware, no machine had been built. Mr. Layman also started his patent attorney, E. E. Huffman, upon an investigation of the patent. Under paragraph two, of the contract of March 2, 1912 the Wagner Company was granted a total of forty days within which to investigate the validity of the patent. At the end of that time Mr. Layman went to New York, and told Mr. Lyndon that the investigation was incomplete and unsatisfactory. Up to that time no payment had been made to Mr. Lyndon.

The defendant offered to show by the witness Layman what took place at the meeting between him and the plaintiff on April 12, 1912, but this the Court excluded upon objection by the plaintiff. Defendant's offer was as follows: 'I wish to offer to prove that on the occasion referred to by the witness, the witness told the plaintiff that the validity of the patent was not sustained by the investigation which he had caused to be made by his patent attorneys, and that further time was desired for the purpose of making an investigation, and that he would not pay the $750 unless the contract was modified so as to permit the Wagner Electric Manufacturing Company to withdraw from the contract and terminate the contract by the time the next payment of a thousand dollars was to be paid under the terms of the original contract, and that thereupon the plaintiff agreed that it should be modified in the parts covered by a letter dated on that date, drawn up at that time'; and the letter was as follows: (signatures omitted)

'Mr. Lamar Lyndon,
60 Broadway
New York City,

Dear Sir:—

In accordance with the terms of our contract of March 2nd and your supplementary letter of the same date, pertaining to U. S. Patent No. 815,360, I hand you herewith accepted sight draft on our company in the sum of Seven hundred and fifty dollars ($750.00). This covers the first payment provided for in paragraph 2 of our agreement.

You will understand by this letter and this payment that the Wagner Company avails itself of the licenses, privileges, etc. under U. S. Patent No. 815,360 contemplated and covered by our agreement of March 2. We are proceeding actively with the design and manufacture of an experimental equipment and expect to have the same on test in approximately sixty (60) days. It was a part of our understanding in connection with the agreement of March 2nd, that it might be re-drafted as to language form etc. by our attorneys, if they deem it desirable to do so.

I am leaving for Washington to-day and if in the opinion of our counsel, Mr. Melville Church, such re-drafting is desirable, I will present to you a redrawn form of agreement for your signature early during the coming week. Under the terms of the agreement of March 2nd, next payment to you on account of this contract in the sum of One Thousand Dollars ($1000.00) will be due and payable October 2nd, 1912, providing the Wagner Company at that time desires to
20 go forward with the agreement. If at that time, the Wagner Company should desire to elect to withdraw from further obligations under the contract, it is understood and agreed that they may do so, forfeiting, however, the sum of the payment of Seven Hundred and Fifty Dollars ($750.00) tendered you with this letter.

While in Washington, I will have Mr. Church draft a brief license agreement for recording at Washington, as required under the terms of the United States Patent Law."

The testimony offered to be introduced was excluded by the Court over defendant's objection. The Court also excluded the letter of April 12, 1912. The defendant also offered to show by the witness Layman that the defendant had at no time built or sold any machines under the patent in question, and had at no time exercised any rights over the patent; and that the defendant had done nothing more than build an ex-

perimental machine, which experimental machine was not a success. Objections to this offer of proof having been made, the Court announced its ruling in the following language:

'The Court: That objection will be sustained, because the transaction to this day shows that the right of election is still open.''

The defendant also offered to show that in October 1912, witness had a conversation with the plaintiff in which he told plaintiff that a machine constructed under the patent was not a commercial success, and that following this conversation defendant wrote a letter to this plaintiff dated, November 9, 1912, as follows:

'We have decided to avail ourselves of the privileges accorded under our letter of April 12th, 1912, and also in accordance with the conversation of Mr. Fynn and myself with you in New York City, October 18th, and terminate the agreement with you with respect to Patent No. 815,360. For this reason, your draft of $1,004.16 which would otherwise have constituted a second payment under the agreement, was ordered returned to you yesterday.

I will ask your attorney to prepare a proper form of re-assignment to you of Patent No. 815,360 and will forward this to you in the very near future.'

Plaintiff objected to the introduction of this letter and to the offer of proof, and the objection was sustained. Defendant also offered to show by the same witness why a re-assignment of the patent at that time had not been made to the plaintiff. The plaintiff objected, and the objection was sustained by the Court. Mr. Layman testified that the Wagner Company had at no time elected either to operate under the license provisions of the contract or to purchase the patent. The defendant also offered in evidence its answer in a suit filed on the 13th day of March, 1913, by the plaintiff
21 against the defendant, being Cause No. 83059, in the Circuit Court of the City of St. Louis, in which answer the defendant notified the plaintiff that it had terminated and abandoned the contract, and was claiming no rights under it. To this offer of proof the plaintiff objected, and the Court sustained the objection.

The defendant also offered to introduce in evidence a letter from the plaintiff to the defendant, dated March 6, 1912, as follows; (Formal parts omitted).

'This is a request that you will kindly have your attorneys expedite the search you propose to have made in connection

with my patent on automobile motors, and to bring the matter to as speedy a conclusion as possible.

My reason for asking this is that I have to-day received a favorable letter from the other parties who were considering the purchase of this patent. If you should decide not to consummate the agreement, I would like to sell it to them; on the other hand, I do not desire that they shall expend any time or money in an investigation if it would prove fruitless for them to do so. The terms of our agreement give us 40 days to conclude the matter, but in view of this communication today, I trust you will do everything in your power to reach your decision as early as possible.

This letter was also excluded upon plaintiff's objection.

At the conclusion of the testimony the Court gave a peremptory instruction directing the verdict for the plaintiff for the full amount sued for with interest.

Opinion.

Counsel for appellant first insists that the trial court erred in its ruling excluding the letter from Mr. Layman, the president of the Company, to Mr. Lyndon, the patentee of the electric device mentioned, dated April 12, 1912, set out in the statement of the case. In our opinion that insistence is well grounded, and consequently the ruling of the Circuit Court in that regard was erroneous. That letter was written within the forty days within which the Company had to accept or reject the contract dated March 2, 1912. In said letter of April 12, 1912, the Company practically rejected the contract, and so stated, unless the plaintiff would extend the time to the defendant to accept or reject the contract until October 2, 1912, the date when the $1000.00 mentioned in the contract, paragraph 2, was to become payable; and in which letter the Company enclosed to plaintiff a draft for $750., the amount of the first payment due under the contract.

The plaintiff, in accepting the letter of April 12, 1912 and the draft for $750 therein enclosed, thereby, by implication, assented to the extension of the time in which the defendant might exercise its option to accept or decline to accept the contract of March 2, 1912. In our opinion there can be no reasonable doubt but that by agreement of the parties, the time to accept or reject the contract of March 2, 1912, was extended to October 2, 1912, which fact the defendant had the

right to show by the offered evidence, which, by the Court was excluded upon the objection of the plaintiff; that was error.

22 But in the light of the remainder of the record bear-upon that question, we are unable to see in what possible way that error injured the defendant. The record further shows that the defendant did not accept or reject the contract within the time of extension before mentioned, to-wit, October 2, 1912, and did not until November 9, 1912, more than a month after the expiration of the time in which the defendant had to accept or reject it. So we are of the opinion that the error before mentioned was harmless, and did the defendant no harm.

II.

Counsel for defendant also contend that the trial court erred in excluding the letter of Mr. Laymen, the president of the Company to Mr. Lyndon, the plaintiff, dated November 9, 1912, terminating the contract of March 2, 1912.

In our opinion this contention is not well grounded, for the reason that, by paragraph 8 of the contract, it is provided, that: "If, at the expiration of two years from the date of this agreement" it may so do etc. While the said letter of November 9, 1912, undertakes and attempts to terminate the contract of March 2, 1912, yet that attempt was ineffectual for the reason that said attempt was made before the two years had expired, mentioned in said paragraph 8 of the contract, and therefore, the attempt was premature and not binding upon the plaintiff.

There was no error in excluding said letter.

For the same reason the Court excluded the letter of defendant to the plaintiff dated November 9, 1912, as before stated. The Court also properly excluded the answer of the defendant filed March 13, 1912, in a suit instituted by plaintiff against the defendant to recover the $1000.00 mentioned in paragraph 2, of the contract. That answer was filed practically one year before the two years before mentioned, had expired, and therefore long prior to the time the defendant had the right to terminate the contract.

Finding no error in the record, the judgment of the Circuit Court is affirmed. All concur.

A. M. WOODSON, Judge.

23 (Motion of Defendant, Charles E. Morhstadt, Sheriff, etc., to dismiss.)

(Filed in the U. S. District Court on June 20, 1920.)

State of Missouri,
County of St. Louis—ss.

In the Ditsrict Court of the United States for the Eastern Judicial District of Missouri.

Wagner Electric Manufacturing Company, a corporation, Plaintiff,
vs.
Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, Defendants.

Comes now Charles E. Mohrstadt, the Sheriff of the City of St. Louis, State of Missouri, one of the defendants in the above entitled cause, and prays the Court to dismiss the plaintiff's bill filed herein for the following reasons, to-wit:

First: The Court has no jurisdiction of this party defendant, the Sheriff of the City of St. Louis.

Second: The Court has no jurisdiction of the subject matter of this suit as against the Sheriff of the City of St. Louis for there is no diversity of citizenship as between the Sheriff of the City of St. Louis and the plaintiff herein—The Wagner Electric Manufacturing Company and said Sheriff being both citizens of the State of Missouri—and there is no substantial federal question involved between the plaintiff and this defendant.

Third: For the reason that the plaintiff's petition filed herein does not contain facts sufficient to constitute a
24 cause of action against this defendant.

Fourth: There is no equity in the plaintiff's bill as against this defendant.

Fifth: From all the facts as stated in the bill, the plaintiff has a full, complete and adequate remedy at law.

Sixth: From the facts stated in the bill, the question involved in the plaintiff's bill is res adjudicata, having been finally determined in the original suit between the plaintiff and the defendant, Lamar Lyndon.

Seventh: The plaintiff in said bill has not offered to do equity so far as the defendant Sheriff is concerned, when the

plaintiff is charged with the knowledge that the Sheriff of the City of St. Louis has made a levy under a perfectly good and valid execution so far as said Sheriff is concerned and collected the proceeds of the judgment, that under the law, it is said Sheriff's duty to pay said proceeds over to the judgment creditor, Lamar Lyndon, or subject himself to the danger of being required to pay not only six (6) per cent interest on said proceeds while the same are being held by him, but also to pay a penalty of five (5) per cent per month for withholding such payment, and in seeking equity in this Court, the plaintiff has not proferred any indemnity or security whatever to save this defendant harmless from any such liability or penalty that may be imposed by law.

Wherefore, the premises considered, this defendant prays that the plaintiff's bill be dismissed, and that this defendant be discharged with its costs.

CLARENCE T. CASE
Attorney for Charles E. Mohrstadt,
Sheriff of the City of St. Louis.

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25 Application for Special Setting of Motions to Dismiss.

(Filed in the U. S. District Court on June 20, 1920.)

Comes now Charles E. Mohrstadt, Sheriff of the City of St. Louis, State of Missouri, one of the defendants in the above entitled cause, and respectfully represents to the Court that on or about the eleventh day of June, 1921, and since the above entitled suit, this defendant has been served with the following notice, to-wit:

Lamar Lyndon, Plaintiff,
vs.
Wagner Electric Manufacturing Company, Defendant.

June Term, 1917, Cause No. 9984

Execution No. 93. June Term, 1921.

Hon. Charles E. Mohrstadt, Sheriff of the City of St. Louis, Mo.
Sheriff's Office,
St. Louis, Missouri.

Sir:—

26 Formal demand is hereby made on behalf of Lamar Lyndon, and ourselves as attorneys of record in the above entitled cause, for the money made on the ex-

ecution in said cause, said execution being No. 93, June Term, 1921, to-wit: $14,561.70, the debt and interest due on the judgment in said cause, and now held and retained by you from the said plaintiff without legal justification or excuse.

You are hereby further notified of the intention and purpose of the plaintiff to proceed under Section 1673 of the Revised Statutes of Missouri, 1919, for the recovery of the amount so withheld, together with lawful interest thereon, and damages at the rate of five (5) per cent per month, as provided by said statute.

Respectfully,

(Signed) RIPPY & KINGSLAND
Attorneys for Lamar Lyndon, plaintiff in the above-entitled cause.

Your petitioner further states that he has filed a motion to dismiss the plaintiff's bill in this cause, which said motion is now pending in this Court, and that by reason of the heavy penalties named by the execution of Lamar Lyndon, it is necessary that this defendant's motion to dismiss be determined as speedily as possible.

Wherefore, The premises considered, this defendant prays that the Court grant defendant a special setting and an early hearing on said motion to dismiss.

CLARENCE T. CASE
Attorney for Defendant Charles E. Mohrstadt, Sheriff, City of St. Louis, Missouri.

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27 (Motion of Defendant, Lamar Lyndon to dismiss.)

(Filed in the U. S. District Court on July 13, 1920.)

Comes now the defendant, Lamar Lyndon, by his solicitors, and appearing specially for this motion and none other, moves the Court to dismiss the bill of complaint herein, for the following reasons, to-wit:

1. That the Court is without jurisdiction of this suit for the reason that there is no diversity of citizenship and, as appears from the face of the bill, there is no substantial Federal question involved.

2. That the Court has no jurisdiction of this cause for the reason that it is a suit, as appears from the face of the

bill, seeking a writ of injunction to stay proceedings in a state court, contrary to Section 265 of the Judiciary Act.

Wherefore, defendant, Lamar Lyndon, prays that the bill of complaint be dismissed and that this defendant recover his costs.

RIPPEY & KINGSLAND
Solicitors for defendant
Lamar Lyndon.

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28 (Opinion sustaining motion of Charles E. Morhstadt, Sheriff, to Dismiss.)

(Filed in the U. S. District Court on August 1, 1921.)

It is settled that an action may be maintained where the court has jurisdiction of the parties to set aside a judgment of a State Court—(1) where it was rendered without jurisdiction; (2) where it is unconscionable because of (3) fraud, (4) accident, or (5) other fact or condition which properly brings the cause of action within the powers of a court of equity.

In Simon v. Railway, 236 U. S. 115, service was held invalid; consequently the judgment was void for want of personal jurisdiction.

But it is useless to review authorities in detail. The distinction between those cases and the case at bar is clear.

"An attack upon a judgment of a state court cannot be entertained by a Federal court where the proceeding is merely tantamount to a motion to set a judgment aside for irregularity, or to a writ of error, or to a petition or bill of review. Proceedings of the latter character, as a matter of course, are only maintainable in the court where the record remains." U. S. v. Norsch, 42 Fed. 417.

The whole matter is fully reviewed and disposed of in National Surety Co. v. State Bank, 120 Fed. 593, in which Judge Sanborn says,—

29 "But it (the court) has no power to take such action on account of the errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the courts which render the judgment or decree".

Numerous cases are cited.

In this case there is no claim of lack of jurisdiction. No claim of fraud; no claim of accident. The claim that the judgment is unconscionable is based upon the assertion that the trial court and the Supreme Court of Missouri erred in failing and refusing to pass upon a specific question fully presented to the Court. This error was presented in the trial court by a motion for a new trial. In the Supreme Court by a petition for rehearing. Evidently the trial court and the Supreme Court did not deem it necessary to decide the question urged. Whatever may be the reason, the parties appeared in the court of general jurisdiction—the tribunal fixed by the people of the State of Missouri, with full power to hear and determine the matters in issue.

Even if there was error, as alleged by the plaintiff, there is no mode by which such error may be reviewed, except the mode provided by the statutes of Missouri and the practice of the courts of Missouri. It is safe to say that in nine cases out of ten, the defeated party, after he reads the opinion of the Supreme Court, still honestly believes that he is right, and that the court is wrong. It is a common complaint of counsel that the Supreme Court of the State, or of the United States, failed to consider and pass upon some particular point which they consider as conclusive. Any rule by which this Court would assume jurisdiction of an action to set aside a judgment because the Judge failed or refused to consider and determine some specific point urged by counsel, would soon double the present heavy trial dockets.

30 There are no facts alleged entitling the plaintiff to maintain this suit.

(Decree, July 31, 1921.)

And now on this 31st day of July, 1921, the motion of Charles E. Mohrstadt, Sheriff, to dismiss the plaintiff's petition, having been heretofore submitted, and the court being now fully advised, finds that said motion should be, and the same is hereby sustained. The plaintiff's petition is dismissed and judgment is rendered against the plaintiff for costs, taxes at $.....

Plaintiff excepts.

MARTIN J. WADE,
Judge.

31 (Petition for Appeal.)

(Filed in the U. S. District Court on October 17, 1921.)

The above named plaintiff, Wagner Electric Manufacturing Company, a corporation, conceiving itself aggrieved by the order entered on August 1, 1921 in the above entitled proceedings, doth hereby appeal from said order to the United States Circuit Court of Appeals, and it prays that this, its appeal may be allowed: and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals.

CHARLES A. HOUTS,
ALBERT BLAIR,
THOS. J. COLE,
Attorneys for Plaintiff and
Appellant, Wagner Electric Manufacturing Company, a corporation.

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32 Assignment of Errors.

(Filed in the U. S. District Court on October 17, 1921.)

Now comes the Wagner Electric Manufacturing Company, a corporation, the plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in its prosecuting of the appeal herein, from the decree made and entered by this Honorable Court on the 1st day of July, 1921.

1. The District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri erred in sustaining defendant's motion to dismiss the plaintiff's petition herein.

2. Said court erred in dismissing plaintiff's petition and rendering judgment against plaintiff for costs.

3. Said court erred in holding that it was within the jurisdiction of the Circuit Court of the City of St. Louis, Missouri to enter the judgment, (under which plaintiff's property was taken) without having received or considered any evidence whatsoever upon the question which, under the pleadings, had to be determined before any judgment could be rendered against the plaintiff.

4. Said court erred in holding that it was within the power of the judge of the Circuit Court of the City of St. Louis, Missouri to direct and compel the entry of the judgment under which plaintiff's property was taken, without the Judge or the jury in said cause having considered and determined the controlling question in the cause, raised by the pleadings therein, without a determination of which no verdict or judgment could be rendered against the plaintiff.

33 5. Said court erred in holding that it was within the power of the Supreme Court of the State of Missouri to affirm the judgment of the Circuit Court of the City of St. Louis, Missouri under which plaintiff's property was taken, without plaintiff having an opportunity to be heard in the oral presentation of said cause before all of the judges participating in the determination of said cause in said Supreme Court.

6. Said court erred in holding that the judgment of the Circuit Court of the City of St. Louis, Missouri, under which plaintiff's property was taken, and the judgment of the Supreme Court of Missouri affirming said judgment, were not prohibited and made void by those provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which prohibit the taking of property without due process of law and guarantee to every person the equal protection of the law.

7. Said court erred in holding that the defects in said judgment and in the rendition thereof, as described in the plaintiff's petition, were mere errors, which could only be reviewed in the manner and mode prescribed by the Statutes of the State of Missouri.

Wherefore, the appellant prays that said decree be reversed, and that said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri be ordered to enter a decree reversing the decree complained of and re-instating plaintiff's case in said court.

THOS. J. COLE
CHARLES A. HOUTS
For Plaintiff (Appellant)

34 (Bond on Appeal.)

(Filed in the U. S. District Court on October 17, 1921.)

Know All Men By These Presents,

That we, Wagner Electric Manufacturing Company, Principal, and Massachusetts Bonding and Insurance Company of Boston, Mass., as Surety are held and firmly bound unto Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis in the full and just sum of Five Hundred ($500.00) Dollars to be paid to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, their heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 12th day of October in the year of our Lord one thousand nine hundred and Twenty-one.

Whereas, lately at the term ..... A. D. 19...., of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between Wagner Electric Manufacturing Company, a corporation, plaintiff and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, defendants, final decree was rendered against the said Wagner Electric Manufacturing Company, a corporation, and said Wagner Electric Manufacturing Company has obtained an appeal of the said Court to reverse the said final decree in the aforesaid suit, and a citation directed to the said Lamary Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, citing and admonishing them to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said Wagner Electric Manufacturing Company shall prosecute said appeal to effect, and answer all damages and

costs if it fail to make good its appeal, then the above obligation to be void, else to remain in full force and virtue.

Sealed and Delivered in the Presence of

WAGNER ELECTRIC
MANUFACTURING COMPANY,
a corporation
By W. A. Layman (Seal)

MASSACHUSETTS BONDING &
INSURANCE COMPANY (Seal)
By Paul Robyn (Seal)
Resident Vice President

Attest: John J. Henschke,
Resident Assistant Secretary.

Approved by C. B. Faris, Judge.

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35 (Order allowing appeal, etc.)

Now at this day comes the plaintiff, by its attorneys, and files and presents to the court its petition for appeal to the United States Circuit Court of Appeals, its assignment of errors, and an appeal bond in the sum of Five Hundred Dollars, with the Massachusetts Bonding & Insurance Company of Boston, Massachusetts, as surety, and prays an appeal in the above entitled cause. And the Court having seen and examined said petition and bond, doth order that said bond be approved and filed, which is done, and that an appeal be and is hereby allowed said plaintiff to the United States Circuit Court of Appeals, from the judgment or decision of the court heretofore rendered herein.

Dated: October 17th, 1921.

C. B. FARIS,
Judge.

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33 **(CLERK'S CERTIFICATE TO TRANSCRIPT.)**

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby Certify that the foregoing is a true and complete record of the proceedings in Cause No. 5714, wherein the Wagner Electric Manufacturing Company, a Corporation, is Plaintiff, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, are defendants.

In Witness whereof, I hereunto subscribe my Name and affix the seal of said Court at office in the City of St. Louis, in the Eastern Division of said District, this 14th day of December in the year of our Lord nineteen hundred and twenty-one. [Seal U. S. Dist. Court, East. Div., East. Jud. Dist. Mo.] Jas. J. O'Connor, Clerk of said Court.

Filed Dec. 15, 1921. E. E. Koch, Clerk.

34 **(APPLICATION OF APPELLANT FOR LEAVE TO AMEND ASSIGNMENT OF ERRORS AND ADDITIONAL ASSIGNMENT OF ERRORS.)**

[Title omitted.]

Now comes counsel for the appellant in said cause and states to the Court that on the 17th day of October, 1921, he filed in the United States District Court for the Eastern District of Missouri, an assignment of errors intended to be a part of the record in said cause; that the Clerk of this Court thereafter, to-wit: on the 6th day of February, 1922, furnished to counsel, a printed copy of the record in said cause as certified to this Court; that on examination of said printed copy counsel for appellant found that the assignment of errors in said record did not contain two specifications of error which counsel regards as too important to be omitted. Counsel thereupon sought to obtain from the attorney for appellee, Sheriff Charles E. Mohrstadt, and from Messrs. Rippey & Kingsland, attorneys for Lamar Lyndon, assent to an amendment as hereinafter proposed, which assent they declined to give.

Wherefore counsel for appellant asks the Court to make an order by which the record, assignment of errors and transcript thereof be corrected and amended in the following respects:

First. By striking out wherever it may occur in said record and transcript, the Roman numerals IV and *IVX* and substituting in each such case the word "Fourteenth."

Second. To amend said record by inserting two other additional specifications of error to be numbered respectively, No. 8 and 9. Said No. 8 to be in the following words, to-wit:

No. 8. That said Court erred in dismissing plaintiff's bill as to the defendant Charles E. Mohrstadt, Sheriff of the city of St. Louis.

Said No. 9 is as follows:

35 No. 9. That said Court erred in holding that judgment was not invalid notwithstanding Division No. One of the Supreme Court of Missouri had refused to grant the motion of the appellant in this case, (then defendant in the suit of Lamar Lyndon vs. Wagner Electric Manufacturing Company, then pending in Division No. One of the Supreme Court of Missouri) to transfer said cause to the Supreme Court of Missouri sitting in banc, as required by the Fourth Section of the Amendment of 1890 to the Constitution of the State of Missouri; said Section Four of the said Constitution is stated in the following language:

"Sec. 4. Case transferred to Court in banc, when.—When the judges of a Division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Said motion states as follows, to-wit:

[Title omitted.]

APPELLANT'S MOTION TO TRANSFER TO COURT EN BANC.

[Filed Mar. 30, 1922.]

Now comes the appellant, Wagner Electric Manufacturing Company, and feeling itself aggrieved by the judgment of affirmance entered herein, moves the Court to transfer said cause to Court en banc for rehearing upon the questions involved; and for the grounds of its said motion states:

1. That his honor, Judge Woodson, who wrote the opinion in this cause and participated in the decision thereof, was not present at the oral argument.

36 2. The appellant in being denied the right of oral argument before the Judge of this division who wrote the opinion, and participated in the decision of this case, was denied the right of due process of law, as guaranteed to it by Section 30 of Article II of the Constitution of the State of Missouri.

3. The appellant by being denied the right of oral argument before the Judge of this division who wrote the opinion and participated in the decision of this case, was denied the right of due process of law guaranteed to it by Article XIV of the Amendments to the Constitution of the United States.

4. A Federal question is now involved, justifying the transfer of this cause to Court en banc, as provided in Section 4 of the Amendment of 1890 to the Constitution of the State of Missouri.

5. The Court inadvertently has misconstrued the contract herein sued upon, and inadvertently has failed to consider the lack of evidence and the lack of pleadings in this cause, to sustain the judgment which it has ordered affirmed, and the Court should, of its own motion, order this case transferred to Court en banc for reargument, because of the denial of justice which results from the decision herein rendered. Albert Blair, Charles A. Houts, Attorneys for Appellant.

Notice of the presentation of this application was given to Mr. Clarence T. Case, counsel for the appellee, Sheriff Charles E. Mohrstadt, and also on Messrs. Rippey & Kingsland, attorneys for Lamar Lyndon on the 22nd day of March, 1922. —— ——, Attorneys for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on March 30, 1922.

37 **(ORDER GRANTING LEAVE TO APPELLANT TO FILE ADDITIONAL ASSIGNMENT OF ERRORS.)**

[Filed March 30, 1922.]

[Title omitted.]

Upon motion of counsel for appellant for leave to amend its assignment of errors herein, counsel for appellees being present and not objecting thereto, it is ordered by the Court, that leave be, and is hereby, granted the appellant herein to file its amendment to the assignment of errors and that said motion containing the amendment be printed and added to the record heretofore printed.

March 30, 1922.

38 **(APPEARANCE OF COUNSEL FOR APPELLANT.)**

[Filed Dec. 15, 1921.]

[Title omitted.]

The Clerk will enter my appearance as Counsel for the Appellant. Charles A. Houts, Albert Blair, Pierce Bldg., St. Louis. Thomas J. Cole, 1530 Boatmens Bank Bldg.

(APPEARANCE OF COUNSEL FOR APPELLEE.)

Filed in U. S. Circuit Court of Appeals Feb. 8, 1922.

The Clerk will enter my appearance as Counsel for the Appellee. Clarence T. Case. Victor J. Miller. David W. Voyles.

39 (MOTION OF APPELLEE LYNDON TO DISMISS.)

Notice.

[Filed March —, 1922.]

To Wagner Electric Manufacturing Company, or Its Attorney of Record:

You are hereby notified of the filing of the annexed Motion to Dismiss the above-entitled cause, and you are further hereby notified that on Wednesday, March 15, 1922, at 2 o'clock P. M., or as soon thereafter as counsel may be heard, the said Motion to Dismiss will be called for hearing in the United States Circuit Court of Appeals, Eighth Circuit, at the Custom House, St. Louis. Rippey & Kingsland, Attorneys and of Counsel for Lamar Lyndon.

St. Louis, Missouri, March 14, 1922.

Received a copy of the foregoing Notice, and annexed Motion to Dismiss, this 14th day of March, 1922. Charles A. Houts, Attorney for Wagner Electric Manufacturing Company.

* * * * * * *

MOTION TO DISMISS.

[Filed Mar. 15, 1922.]

Now comes Lamar Lyndon, nominal appellee in the above-entitled cause and appearing, through his attorneys, for the purpose of this motion and none other, moves the Court to dismiss the appeal filed herein as against said nominal appellee, and for grounds thereof shows:

1. That the said Lamar Lyndon is a citizen and resident
40 of the City of New York and State of New York.

2. That the said Lamar Lyndon has never been served with any process in said cause and has never entered any appearance in said cause subjecting him to the jurisdiction of the District Court, or of this Court.

3. That no citation has ever been served upon the said Lamar Lyndon, nor has the service of the same been in any wise waived.

Wherefore, the said Lamar Lyndon prays that the appeal herein be dismissed as to him. Lamar Lyndon, By John D. Rippey & L. C. Kingsland, Attorneys and of Counsel for Lamar Lyndon.

STATE OF MISSOURI,
City of St. Louis, ss:

Lawrence C. Kingsland, being duly sworn, states that he is the attorney and of counsel for Lamar Lyndon, a nominal appellee in

the above-entitled cause; that he knows the facts stated in the above motion, and knows that the same are true. L. C. Kingsland.

Subscribed and sworn to before me this 7th day of March, 1922. My commission expires November 13, 1923. (Seal.) N. B. Sumner, Notary Public.

[Endorsement omitted.]

41 **(MOTION OF APPELLEE, MOHRSTADT, SHERIFF, ETC., TO DISMISS.)**

[Filed Mar. 15, 1922.]

Now comes Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, one of the appellees in the above-entitled cause, and appearing by Clarence T. Case, his attorney, moves the Court to dismiss the appeal filed herein and for grounds thereof says:

I.

1. That on July 20, 1921, a judgment was entered against Charles E. Mohrstadt, Sheriff, the above-named appellee, by the Circuit Court of the City of St. Louis, for the amount recovered by the said Charles E. Mohrstadt from the defendant, and which is the sum referred to in the bill of complaint in this cause, in favor of Lamar Lyndon.

2. That subsequent to the entry of the decree and order of July 31, 1921, by the District Court dismissing the bill of complaint herein, Lamar Lyndon, by proceedings duly had in the suit pending in the Circuit Court of the City of St. Louis, and mentioned in the bill of complaint herein, recovered the said sum from the appellee, Charles E. Mohrstadt, Sheriff, upon execution; that the judgment in the suit in the Circuit Court of the City of St. Louis against Charles E. Mohrstadt, Sheriff, was fully satisfied of record on August 9, 1921; and that said sum has therefore passed out of the possession and control of the appellee, Charles E. Mohrstadt, Sheriff.

3. That the questions raised upon this appeal have therefore become moot questions, as the relief sought by the appellant by the bill of complaint herein cannot be granted, because the acts sought to be enjoined have already been performed and the fund sought to be reached has passed out of the possession and control of this appellee.

42 II.

The appellee, Charles E. Mohrstadt, Sheriff, further shows that the District Court and this Court are without jurisdiction of the cause, for the reason that the bill of complaint seeks a writ of injunction to stay proceedings in a state court contrary to Sections 265 of the Judicial Code.

III.

The appellee, Charles E. Mohrstadt, Sheriff, further shows that

the District Court and this Court have no jurisdiction of the subject-matter in this suit, as against the sheriff of the City of St. Louis, for there is no diversity of citizenship as between the Sheriff of the City of St. Louis and the appellant herein, the Wagner Electric Manufacturing Company, and there is no substantial Federal question involved between appellant and this appellee.

IV.

The appellee, Charles E. Mohrstadt, Sheriff, further shows that the decree and order dismissing the bill of complaint herein and the opinion filed by the court, which was entered on July 31st, 1921, dismisses the cause for lack of jurisdiction in the District Court; that an appeal from a decree or order dismissing a bill of complaint for lack of jurisdiction is appealable directly to the Supreme Court of the United States under Section 238 of the Judicial Code, as amended by Act of January 28th, 1915, and consequently the appeal to this Court is void for lack of jurisdiction.

Wherefore, appellee, Charles E. Mohrstadt, Sheriff of the City of St. Louis, prays that the appeal herein be dismissed. Charles E. Mohrstadt, Sheriff, City of St. Louis. By Clarence T. Case, Attorney for Charles E Mohrstadt, Sheriff of the City of St. Louis.

43 STATE OF MISSOURI,
City of St. Louis, ss:

Clarence T. Case, being duly sworn, states that he is attorney for Charles E. Mohrstadt, Sheriff, appellee, in the above-entitled cause that he knows the facts stated in the above motion, and knows that the same are true. Clarence T. Case.

Subscribed and sworn to before me this 15th day of March, 1922. My Commission expires June 18, 1924. [Seal.] A. C. C. Schoknecht, Notary Public.

(ORDER DENYING MOTIONS TO DISMISS.)

[Filed March 30, 1922.]

Before Judges Sanborn and Dyer.

December Term, 1921.

Thursday, March 30, 1922.

This cause came on this day to be heard upon the motion of the appellee Charles E. Mohrstadt, Sheriff, etc., to dismiss the appeal and also upon the motion of the appellee Lamar Lyndon to dismiss the appeal as to himself; Mr. Clarence T. Case appearing for the appellee Mohrstadt and Mr. L. C. Kingsland appearing for the appellee Lyndon, in support of the respective motions and Mr. Charles A. Houts appearing in opposition to the same.

On consideration whereof, it is now here ordered by this Court that the said motions to dismiss be, and they are each hereby, denied, but without prejudice to renew the same at the time of the submission of this case on the merits. March 30, 1922.

44 **(ORDER OF SUBMISSION.)**

May Term, 1922.

Before Judges Carland, Trieber, and Munger.

Saturday, May 27, 1922.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Charles A. Houts for appellant, continued by Mr. Clarence T. Case for appellee Mohrstadt, Sheriff, and by Mr. Lawrence C. Kingsland for appellee Lyndon and concluded by Mr. Charles A. Houts for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court, the briefs of counsel filed herein and the motions to dismiss by appellees.

45 **(OPINION.)**

[Filed July 5, 1922.]

[Title omitted.]

Mr. Charles A. Houts (Mr. Thomas J. Cole and Mr. Albert Blair were on the brief with him), for appellant.

Mr. Lawrence C. Kingsland (Mr. John D. Rippey was on the brief with him), for appellee, Lamar Lyndon.

Mr. Clarence T. Case, for appellee, Charles E. Mohrstadt, Sheriff of the City of St. Louis, Mo.

Before Carland, Circuit Judge, and Trieber and Munger, District Judges.

TRIEBER, *District Judge*, delivered the opinion of the Court.

This is an appeal from a decree sustaining a motion to dismiss the bill of complaint and dismissing the bill with costs. The bill is very voluminous and there are a large number of assignments of error, mostly repetitions.

The facts as charged in the bill may be briefly stated as follows:

The appellant had entered into a contract with the appellee Lamar Lyndon claiming an indebtedness due him from appellant on this contract, instituted an action against it in the Circuit Court of the City of St. Louis, State of Missouri, and upon a trial to a jury recovered a verdict for the amount claimed on a peremptory direction

by the court. From this judgment it appealed to the Supreme Court of the State of Missouri, which affirmed the judgment of the lower court. Upon the filing of the mandate of the Supreme
46 Court in the Circuit Court, an execution was issued, directed and delivered to the appellee Mohrstadt, Sheriff of the City of St. Louis, who collected it, the appellant paying it to him. Thereupon this action was instituted in the District Court. The prayer of the bill is to enjoin the appellee sheriff from paying the money collected by him from the plaintiff under the execution and that plaintiff be adjudged to have this money returned to him and that the defendants, be directed to release all claims thereto.

The only substantial grounds relied on by the plaintiff for the relief are that the trial judge in the action in the State Court had no right to direct a verdict in favor of the plaintiff, as there was no evidence to warrant it and by reason thereof appellant was deprived of rights guaranteed to it by the Fourteenth Amendment. The other ground is that at the hearing of the appeal in the Supreme Court of Missouri which was had before one of the divisions of the Court, as may be done under the Constitution of that State, only two of the three members of the division were present at the oral argument, but while this appeal was under consideration, the two Justices, who heard the oral argument called in the third Justice, and it was this Justice who prepared the opinion of the court. This, it is claimed, deprives him of a right under the Fourteenth Amendment.

There are other assignments of error, but they are not of sufficient importance to require consideration. Counsel for appellant frankly stated to this court in his oral argument that he has been unable to find any authority on either of the issues of law contended for by him. This is not surprising. Although the Fourteenth Amendment to the Constitution has been invoked on almost every conceivable question, which the ingenuity of counsel could think of, it remained for counsel for appellant to invoke it upon the facts set out in its bill of complaint.

While a national court may enjoin enforcement of a judgment of a State Court, if inequitable and for fraud practiced on the court, Marshall v. Holmes, 141 U. S. 589 and cases following it, or when the state court was without jurisdiction of the person, or the subject matter, as in Simon v. Southern Railway Company, 236 U. S. 115, no court has ever held that such relief could be granted, because the state court erred in the application of the law at the trial of the cause, its jurisdiction of the parties and subject matter being
47 admitted, especially after the Supreme Court of the State, on appeal, had affirmed it. Hartford Life Ins. Co. v. Johnson, 268 Fed. 30, decided by this court and authorities there cited. Counsel seems to be of the opinion that Fayerweather v. Ritch, 195 U. S. 276, sustains his contention. The question involved in that cause was whether the plea of res judicata set up by the defendant, under a judgment of a state court was good and the plea was held to have been properly sustained by the trial court. There is nothing in the opinion in that case in any wise affecting the issues involved in the instant case.

That the opinion of the Supreme Court on the appeal was prepared by a member of the court, who did not hear the oral argument, is equally without merit. Assuming that the third judge should not have participated in the decision, a question unnecessary to determine, still, as the two judges who heard the argument concurred in the result, it is as much their opinion as that of the judge who prepared it. The two judges constituted a quorum of the court and may, under the Constitution of Missouri, decide appeals with the same effect as if all the judges had heard the oral argument and decided the appeal.

As the appeal was submitted to the Supreme Court on briefs as well as oral argument, the third judge had the benefit of the briefs and appellant's arguments.

The conclusion reached makes it unnecessary to determine whether a court of the United States may grant an injunction against a sheriff involving property in his possession, seized under an execution of a valid judgment, valid on its face, which is admitted to be the property of the defendant in execution and by him paid or delivered to the sheriff. But see Association v. Hurst, 59 Fed. 1, 7 C. C. A. 598 (6th Circuit; National Surety Co. v. State Bank, 120 Fed. 593, 56 C. C. A. 657 (8th Circuit); United States v. Morris, 262 Fed. 514.

The decree is Affirmed.

Filed July 5, 1922.

48 **(DECREE.)**

[Filed July 7, 1922.]

[Title omitted.]

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be and the same is hereby, affirmed with costs; and that Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, have and recover against the Wagner Electric Manufacturing Company the sum of twenty dollars for their costs herein and have execution therefor. July 7, 1922.

49 **PETITION OF WAGNER ELECTRIC MANUFACTURING COMPANY FOR A REHEARING.**

[Filed Sept. 2, 1922.]

[Title omitted.]

Now comes the Wagner Electric Manufacturing Company, by its solicitors and counsel, and files this, its petition for a rehearing of this cause, in which decree was entered on the seventh day of July, 1922, and prays that a rehearing before a full court be ordered. This prayer is based upon the reasons set forth in the following argument:

50 Appellant based its suit on three violations of the Due Process Clause of the Fourteenth Amendment, to wit:

(*a*) The action of the trial judge in the State Court in the suit of Appellee v. Appellant in giving to the jury a peremptory instruction to find for the plaintiff, the burden of proof under the pleadings in that suit being upon the plaintiff.

(*b*) The action of Division No. 1 of the Supreme Court of Missouri in permitting one of its members, who was not present when the oral argument in behalf of appellant was made before that Division, to take part in the decision of the controversy;

(*c*) The refusal of Division No. 1 to transfer the suit to the Court en banc when requested thereto by appellant upon the ground that at that time there was involved in the controversy a Federal question as contemplated by Section 4 of the Amendment of 1890 of the Constitution of Missouri.

Appellant, in its bill and its printed arguments, contended that each of the three foregoing complaints were sustained by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. As to the first two complaints this Court, in its opinion, disallowed them, and briefly states its reasons therefor. But as to the third complaint, the Court had nothing to say whatever.

The Court, in its opinion, made the following comment:

"Although the Fourteenth Amendment to the Constitution has been invoked in almost every conceivable question which

51 the ingenuity of counsel could think of, it remained for counsel for appellant to invoke it upon the facts set out in its bill of complaint."

The Judge appears to credit counsel with the utmost ingenuity in finding in the facts of this case grounds for a cause of action based upon the Due Process Clause of the Fourteenth Amendment. Counsel disclaim ingenuity in the matter.

The First Ground of Complaint.

The first cause of complaint was so obvious and immediate that no dialectic skill nor refinement of reasoning would be required for

the defendant in a suit as simple as this was, to perceive that he had not had a fair trial when the Judge did not allow the jury to pass upon the question of his liability—it being a case where, under the pleadings, the burden of proof was on the plaintiff. The State Constitution specifically provides that the trial by jury shall remain inviolate (Art. II, Sec. 28 of the Constitution of the State of Missouri).

In disposing of this ground the Court said:

"No court has ever held that such relief could be granted, because the State Court erred in the application of the law at the trial of the cause, its jurisdiction of the parties and subject matter being admitted, especially after the Supreme Court of the state, on appeal, had affirmed it."

The Court failed to perceive that the misconduct of the trial judge was not simply making an erroneous ruling of law, but his wrongful act was to deprive the defendant of his constitu-
52 tional right to have the jury pass on all the evidence. The act complained of lay outside of the zone of judicial discretion. The Judge had no more right to give the peremptory instruction under the circumstances than he would have to instruct the jury in favor of plaintiff before the receipt of any testimony whatever. If this view is incorrect will not this Court state wherein it is erroneous?

Counsel is thoroughly advised that ordinary "judicial error," error committed by the Court upon questions properly coming before the Court for decision, which may be styled "functional error," whether committed at nisi prius or on appeal, is not ground for complaint under the Fourteenth Amendment. But in matters of procedure, whether at nisi prius or on appeal, in which the Judge has no discretion, a departure from the established practice, if injurious, is a violation of the Due Process Clause of the Fourteenth Amendment.

Windsor v. McVeigh, 93 U. S. 274;
Hovey v. Elliott, 167 U. S. 409.

The approval by a State Supreme Court of such misconduct of a nisi prius Judge will not legalize it; indeed, the error may occur in the Supreme Court of the state. More than that, a ruling may be made for the first time in the Supreme Court of the state, and one that may be fair and correct in ordinary cases, but in exceptional cases may work hardship upon one of the parties, and for that reason may be a violation of the due-process clause. An instance of that kind occurred in the case of Saunders v. Shaw, 244 U. S. 317.

53 The Second Ground of Complaint.

The opinion of this Court shows that the Court considered the second ground of our complaint and held it to be unsound. The Court was of the opinion that if the fourth member of Division No. 1 was absent at the time the oral argument was made before the division, but that such judge, after he returned and had read the printed argument, became qualified to participate in the decision,

and it was not improper for him to take part in the case. Counsel still insists that the objection is a valid one, but will not repeat his former arguments, except again to refer to the action of the Supreme Court of the United States and some other courts in situations of a similar character.

In the case of Knoxville Water Company v. Knoxville, 189 U. S. 434, three Judges of the Supreme Court (Justices White, McKenna and Day) were not present at the oral argument, but it was noted, also, "they took no part in the decision of the case," although they had no doubt had an opportunity to read the printed argument.

In the case of Lott v. Pittman, 243 U. S. 386, an appeal from the Supreme Court of Georgia, it appears that the argument was heard by three of the six Judges composing the Georgia Court, but that the decision was made by all six. Upon complaint of that conduct being made, the Supreme Court of Georgia gave notice of its willingness to grant a rehearing—a fact which the Supreme Court of the United States mentioned with approval. In the case of Imboden v. Trust Company, 155 Mo. App. 450, 452, in the St. Louis Court of Appeals, Judge Nortoni, a new Judge, who had not heard
54 the oral argument, wrote the opinion. Upon dissatisfaction being expressed, a rehearing was granted.

The Third Ground of Complaint.

The Court erred in refusing to find and declare that the action of Division No. 1 of the Supreme Court of Missouri in refusing to transfer the suit of appellee v. appellant to the court en banc as and when requested by appellant, was a violation of the due-process clause of the Fourteenth Amendment of the Constitution of the United States. In support of that contention appellant submits the following propositions of law:

First. The primary requirements as to judicial procedure to be observed by the state courts in Missouri are those prescribed by the Constitution and statutes of the state. There are other requirements based on the "law of the land"—common law, but the statutory ones are the ones here intended.

Second. A failure to observe any of these constitutes a violation of the due process as contemplated by the due-process clause of the Fourteenth Amendment of the Constitution of the United States.

Third. Under the Amendment of 1890 of the Constitution of the State of Missouri, the Supreme Court of the state was divided into two divisions, Division No. 1 consisting of four Judges, and Division No. 2 consisting of three Judges, and it was further provided in section 4 of that amendment that whenever there shall be pending in either division a cause in which a federal question shall be involved, the cause shall be transferred to the court en banc.
55 Fourth. In any cause pending before a division of the Supreme Court of Missouri, in which a federal question is involved, and where an application has been made in such cause by one of the parties thereto to have such cause transferred to the court en banc because of the pendency of such federal question, and the

Court has refused to order the transfer, such refusal constitutes a violation of the Due-Process Clause (Section 30) of the Constitution of the State of Missouri, and at the same time constitutes a violation of the Due-Process Clause of the Fourteenth Amendment to the Federal Constitution.

The foregoing four propositions in support of the third ground of complaint probably will be admitted to be correct; if so, the argument is limited to the question whether at the time counsel asked Division No. 1 to transfer the cause to the Supreme Court there was involved in the controversy a Federal question.

Appellant contends that a Federal question arose when the appellant objected to the manner in which Division No. 1 had disposed of appellant's appeal, in this, to wit, that it permitted a Judge who had not heard the oral argument to participate in a dicision of the case—a laxity of procedure which appellant claims was a violation of due process, and the pendency of that contention injected into the case a Federal question. The question is not whether the division committed an error in allowing the fourth Judge to participate, but "Was there involved in the controversy at that time a Federal question?" If a Federal question was involved, then it was the duty of the judges composing Division No. 1 to transfer the case to the court en banc. The fact that the fourth Judge participated in
56 the decision is admitted.

Whether it was or was not an impropriety constitutes a question upon which fair-minded men may differ. Lawyers and judges can be found everywhere who will express their disapproval of that practice. That such question was actually involved in the case of Lyndon v. Wagner Company, pending in Division No. 1 at the time of the motion to transfer was made, ought not to be disputed. The pendency of that question and its effect under the Fourteenth Amendment gave it the qualities of a Federal question. If there was involved a Federal question in the controversy, pending before Division No. 1 of the Supreme Court of Missouri, then the case should have been transferred to the court en banc as directed by Section 4 of the amendemnt of 1890 to the Constitution of the State of Missouri, and as requested *to* by appellant. The refusal of the division to make the transfer constituted a violation of the due-process clause, not only of the State of Missouri, but of the Fourteenth Amendment of the United States.

Counsel begs leave to reiterate the suggestion made in his printed brief (page 23) respecting the motives of public policy that manifestly actuated the framers of the Constitutional Amendment of 1890 in inserting the specific requirement set forth in Section 4 as to how a Federal question should be tried.

The existence of a Federal question in a suit might bring a conflict between a state tribunal and a Federal tribunal or the officers thereof. For that reason the framers of the amendment decided it prudent to require a decision on the question by seven Judges rather than by the three or four judges composing a division—manifestly on the assumption that a tribunal of seven Judges will be
57 less likely to err than one of three or four Judges. It follows that when a Federal question arises in a case pending in a

division, it is incumbent upon that division not to decide it, but t
transfer it to the court en banc.

That Division No. 1 refused to transfer the case to the court e
banc must be admitted. By such refusal it violated a step of th
judicial procedure specifically required by Section 4 of the Const
tutional Amendment of 1890, to wit, a transfer to the court en ban
That requirement is based on the fact that the suit involves a Feder
question—a fact not disputed in this case. The only other questio
remaining is, did Division No. 1 have jurisdiction to decide wheth
such Federal question was involved or not? We say it did not. T
say that it could be done would make it possible in some instanc
for a party to be deprived of the privilege of having his case hear
by the court en banc. Consideration of public policy as pointed o
in our printed argument (page 25) would be against any such vie
A similar predicament has arisen where there is a constitution
question pending before a Missouri Court of Appeals—an inte
mediate court in the Missouri system of courts, as shown in ou
printed argument, page —. The policy of the Supreme Court o
Missouri is that the Court of Appeals should transfer the case an
not decide it.

The Supreme Court of the United States has hitherto refraine
from giving a comprehensive definition of the term, "due process o
law," as contemplated by the Fourteenth Amendment. Th
58 tribunal has gone so far as to specify four of the essenti
elements or conditions constituting due process, to wit:

1. Jurisdiction of the subject matter.

2. Notice to defendant.

3. Opportunity to be heard; and these three are specific requir
ments. The only other condition mentioned is that the Court mu
not in deciding a case act "arbitrarily" (McGovern v. New Yor
227 U. S. 363). This requirements is somewhat vague. Nowhe
is it officially stated what is meant by the term "arbitrarily." W
venture to suggest that in deciding a vital point the judge must n
be governed solely by inclination, and thereby ignore establishe
precepts to the contrary.

At the outset of this controversy counsel were well aware of th
admonition given to lawyers by Mr. Justice Miller of the Unite
States Supreme Court in the case of Davidson v. New Orleans, 9
U. S. 97, forty-five years ago, in which the Justice commented o
the great number of due process cases "then crowding the docket
this court," and said: "There exists in the minds of the lawye
some strange misconception of the scope of the amendment." T
avoid any such error, counsel proceeded to give to the subject
thorough and extensive study. Over three hundred decisions of th
Supreme Court of the United States, and twenty decisions of th
Court of Appeals of the Eighth District, were examined, digeste
and classified. Further, counsel sought by ample preparation to b
able to suggest essential conditions, limitations and other criteria b
which any suit on the due-process clause might be tested and there
approved or rejected. Accordingly, counsel prepared and i
59 serted in his printed argument a chapter entitled, "D

Process of Law Under the Fourteenth Amendment—Its Principles and Limitations." This was done in the hope that it would elicit some measure of instructive discussion of the whole subject from this Court, but in this respect we have been disappointed. Owing to the fact that there were filed two separate printed arguments in behalf of the appellant, the Judge who wrote the opinion may have unknowingly failed to read the one in which this point was discussed.

Conventionally, the Judges know the law upon a given point better than the counsel know it. It is, however, the privilege and duty on the part of the latter to aid the Court in the solution of doubtful points, but there is one duty which counsel cannot slight, and that is, his duty to his client. In the discharge of that duty he should put forth his best efforts in a candid and respectful manner, advocating what he believes to be a correct solution of the case.

In consideration of the foregoing, we respectfully ask for a rehearing of the c... Respectfully submitted, Thos. J. Cole. Charles A. Houts. Albert Blair.

60 Certificate of Counsel.

The undersigned solicitors and counsel for Wagner Electric Manufacturing Company, petitioner, certify: That they are familiar with the record in this case; that they have read this petition; that the same, in their opinion, is undoubtedly well founded in fact and in law; and that this petition is presented in good faith and not for purposes of delay. Thos. J. Cole, Charles A. Houts, Albert Blair, Solicitors and Counsel for the Wagner Electric Manufacturing Company, Petitioner.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 2, 1922.

61 **(ORDER DENYING PETITION FOR REHEARING.)**

[Filed Sept. 18, 1922.]

September Term, 1922.

Monday, September 18, 1922.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied. September 18, 1922.

(PETITION FOR APPEAL TO SUPREME COURT U. S. AND ORDER ALLOWING SAME.)

Comes now the above named appellant, Wagner Electric Manufacturing Company, and feeling itself aggrieved by the decree

entered on the 7th of July, 1922 (petition for re-hearing having been duly filed and overruled on September 18th, 1922), in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and prays that this, its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the Supreme Court of the United States. Charles A. Houts, Albert Blair, and Thos. J. Cole, Attorneys for Plaintiff and Appellant Wagner Electric Manufacturing Company. St. Louis, December 4, 1922.

Now, to wit on December 11th, 1922 it is ordered that the appeal be allowed as prayed for. Walter H. Sanborn, Judge United States Circuit Court of Appeals for the Eighth Circuit.

62 **(ASSIGNMENT OF ERRORS ON APPEAL TO SUPREME COURT U. S.)**

[Filed Dec. 11, 1922.]

And now comes the Wagner Electric Manufacturing Company, appellant, and makes and files this, its Assignment of Errors upon which it will rely, in prosecuting the appeal herein from the judgment rendered in conformity with the opinion of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

1. The said Circuit Court of Appeals erred in holding and deciding that the action of the trial Judge (in the Circuit Court of the City of St. Louis, Missouri), in directing a verdict in favor of the plaintiff in the trial court, Lamar Lyndon, in the absence of evidence to warrant such action or such verdict, did not deprive appellant herein of rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals erred in holding that the direction of the verdict, as described in paragraph 1, supra, was a mere error in the application of the law at the trial of the case.

3. The Circuit Court of Appeals erred in holding that appellant's complaint, that it was deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it was not allowed to orally present and argue the case before all of the judges who participated in the decision, was without merit. This is especially true in view of the fact that the judge who wrote the opinion was absent from the oral argument.

63 4. The Circuit Court of Appeals erred in refusing to find and declare that the action of Division Number One of the Supreme Court of Missouri, in refusing to transfer the suit of Appellee v. Appellant to the Court en Banc, as and when requested by appellant, was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, because there was a federal question involved, and under the amendment of 1890 to the Missouri Constitution, such cases were required to be transferred to the Court en banc. Charles A. Houts, Albert Blair, and

Thos. J. Cole, Attorneys for Appellant, Wagner Electric Manufacturing Company.

(BOND ON APPEAL TO SUPREME COURT U. S.)

[Filed Dec. 11, 1922.]

Know all men by these presents:

That we, Wagner Electric Manufacturing Company, Principal and Massachusetts Bonding & Insurance Company, Surety are held and firmly bound unto Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, in the full and just sum of Five Hundred and 00/100 Dollars, to be paid to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this — day of December in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at the May, 1922, Term of the United
4 States Circuit Court of Appeals for the Eighth Circuit, in a suit depending in said Court between Wagner Electric Manufacturing Company, plaintiff, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, defendants, judgment was rendered against the said Wagner Electric Manufacturing Company, and the said Wagner Electric Manufacturing Company has obtained an appeal to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, citing and admonishing them to be and appear at the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Wagner Electric Manufacturing Company shall prosecute said appeal to effect, and answer all costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue. Wagner Electric Manufacturing Company, Principal, By V. W. Bergenthol, Its Asst. Treas. [Seal.] Massachusetts Bonding & Insurance Company, Surety, By William D. Hemenway, Resident Vice President. Attest: John J. Henschke, Resident Assistant Secretary.

Approved by Walter H. Sanborn.

UNITED STATES OF AMERICA, *ss:*

To Lamar Lyndon and Charles E. Mohrstadt, sheriff of the city of St. Louis, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, District of Columbia, on the 10th day of January, 1923, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Wagner Electric Manufacturing Company is appellant, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis are respondents, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter H. Sanborn, Senior U. S. Circuit Judge this 11th day of December, in the year of Our Lord One Thousand Nine Hundred and Twenty-two. Walter H. Sanborn, Judge United States Circuit Court of Appeals for the Eighth Circuit.

Service of the above citation *if* hereby acknowledged this 12th day of December, 1922. Rippey & Kingsland, Attorney- for Lamar Lyndon. Clarence T. Case, Attorney for Charles E. Mohrstadt, Sheriff of the City of St. Louis.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. No. 5999. Wagner Electric Manufacturing Company, Appellant, vs. Lamar Lyndon, et al., etc. Citation on appeal to Supreme Court U. S., and acknowledgment of service. Filed Dec. 12, 1922. E. E. Koch, Clerk.

66 **(CLERK'S CERTIFICATE.)**

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Wagner Electric Manufacturing Company was Appellant, and Lamar Lyndon, et al., were Appellees, No. 5999, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the fourth day of October, A. D. 1922, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of December, A. D. 1922. [Seal of United States Circuit Court of Appeals, Eighth Circuit.] E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 29,288. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 738. Wagner Electric Manufacturing Company, appellant, vs. Lamar Lyndon and Charles E. Mohrstadt, sheriff of the city of St. Louis. Filed December 16th, 1922. File No. 29,288.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC MANUFACTURING COMPANY, a Corporation,
Appellant,
v.
LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis,
Appellees.
No. 738.

APPELLANT'S BRIEF ON MOTION TO DISMISS.

CHARLES A. HOUTS,
ALBERT BLAIR,
Attorneys for Appellant.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 819.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC MANUFACTURING COMPANY, a Corporation, Appellant, v. LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis, Appellees.	No. 738.

APPELLANT'S BRIEF ON MOTION TO DISMISS.

Appellant filed this suit in the District Court for the Eastern Division of the Eastern District of Missouri. It sought, by its petition, to have a resulting trust declared with respect to the sum of fifteen thousand fifteen and 29/100 ($15,015.29) dollars, then in

the hands of appellee Mohrstadt, Sheriff of the City of St. Louis. This fund came into the Sheriff's hands through the levy of an execution under a judgment in favor of appellee Lyndon and against the appellant Wagner Electric Manufacturing Company, which judgment appellant claims to be void because rendered in violation of the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States.

The appellant, Wagner Electric Manufacturing Company is, and at the time of the institution of the suit was, a citizen of the State of Missouri and a resident of the Eastern Division of the Eastern District of Missouri. Appellee Lyndon was, at the institution of the suit, a citizen of the State of New York. Appellee Mohrstadt, Sheriff of the City of St. Louis, Missouri, was at the time a citizen of the State of Missouri; but, as Mohrstadt was a mere custodian of the fund, claiming no interest in it and no relief with respect to the fund was asked against him, he was a merely formal party, made so for convenience, and his citizenship should be disregarded (Foster's Federal Practice [6th Ed.], Section 42).

Jurisdiction of the District Court was invoked, therefore, on two grounds:

First. On diversity of citizenship existing between the real parties to the controversy; and,

Second. On the ground that a federal question was raised by appellant's claim that the judg-

ment which had been rendered against it by the state court was void, because procured in violation of the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States.

Following the institution of the suit in the District Court, a motion was there made to dismiss the bill for want of equity and failure to state any ground for the relief prayed for. This motion was sustained. Appellant then prosecuted its appeal to the Circuit Court of Appeals for the Eighth Circuit, where the judgment of dismissal was affirmed. Thereupon, appellant prosecuted this appeal to this Court. It had a right to do so, because the jurisdiction of the District Court did not depend alone upon the diversity of citizenship. The petition also invoked the application and construction of the Constitution of the United States, and in such cases the judgment of the Circuit Court of Appeals is not final, and an appeal may be prosecuted from its judgment to this Court.

Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290;
American Sugar Refining Co. v. New Orleans, 181 U. S. 277;
Loeb v. Columbia Twp. Co., 179 U. S. 472.

The motion to dismiss does not challenge the jurisdiction of this Court, but seeks a dismissal upon two grounds, viz.: First, that no federal question

is involved, and second, that the questions presented are frivolous.

In order that your Honors may understand the questions presented by this appeal, it is necessary to briefly state the facts disclosed by the petition filed in the District Court. They are these: Lyndon was the owner of certain letters patent for recharging the storage batteries of automobiles. In the year 1912 he entered into a contract with the Wagner Electric Manufacturing Company, by which the Wagner Company was granted the optional right, either to purchase the patent or to operate under an exclusive license. The contract provided that if the Wagner Company elected to operate under an exclusive license, it should pay a minimum royalty of Three Thousand Dollars a year. Such was the contract, and there has never been any dispute between the parties as to such being the contract between them. In the year 1917 Lyndon filed a suit in the Circuit Court of the City of St. Louis, in which he alleged the contract to be as herein stated, and as a basis for a recovery of approximately four years minimum royalty, he alleged that the Wagner Company had, under the contract, as it had a right to do, elected to avail itself of the privilege of operating under the exclusive license. By an appropriate answer, the Wagner Company denied that it had elected to operate under the exclusive license. The question,

whether the Wagner Company had exercised its right of election, became the sole question in the case. When the case came on for trial no evidence whatever was produced to show that the Wagner Company had elected to operate under a license. The Wagner Company sought by appropriate requests to have the Court and jury decide the one question thus presented by the petition and answer, **but this the Court refused to permit to be done.** It expressly refused to allow that question to be decided, although it was perfectly apparent from the contract and from Lyndon's petition that no liability could be imposed upon the Wagner Company until it should be made to appear that the Wagner Company had exercised its right of election, and had elected to operate under a license. **The question thus presented for decision by the Circuit Court of the City of St. Louis was never decided.** On the contrary, as stated, the Court refused to permit that question to be decided; and without deciding it, the Court directed a verdict for the full amount sued for with interest.

Upon appeal to the Supreme Court of Missouri appellant urged upon that Court the same proposition which it is now urging upon this Court, and yet the Supreme Court of Missouri, with an opinion, written by a judge who was not present at the oral argument, affirmed the judgment of the lower court without once mentioning the proposition which we have

at all stages asserted, to demonstrate the invalidity of the judgment of the lower court. (See opinion in Lyndon v. Wagner Electric Manufacturing Co., 285 Mo. 77.)

From the foregoing your Honors will perceive that the federal question presented on this appeal is not such as is described in appellees' motion to dismiss. The motion to dismiss would indicate that appellant claims that a mere denial of trial by jury is a violation of the due process clause of the Constitution. We have made no such limited claim. **We claim that it is beyond the power of any court to direct a judgment without deciding the questions, or some of them, presented by the pleadings in the case in which the judgment is entered.** We claim that no court has the power to enter a judgment without first determining the fact or facts upon which the rendition of such judgment must depend. We claim if such a judgment is entered, without a judicial determination of the facts upon which such judgment must depend, the enforcement of such judgment is a taking of property without due process of law.

We concede, that if a court decides **ERRONEOUSLY** the questions presented, the erroneous judgment would not be obnoxious to the due process clause of the Constitution. This would be so whether the erroneous judgment was erroneous as to the facts

or as to the law. But, where a court, with its eyes wide open, and with a clear purpose and design, refuses to decide the question presented by the pleadings, upon the decision of which alone liability must depend, and enters a judgment nevertheless, its action in so doing is beyond its power, is arbitrary, oppressive and violative of the due process clause of the Constitution of the United States. Such is the case presented here.

The application of the principles which we are invoking is illustrated by the case of Fayerweather v. Rich, 195 U. S. 276, in which this Court said:

> "Our jurisdiction of this direct appeal from the decision of the Circuit Court is invoked on the ground that the case involves the application of the Constitution of the United States.
>
> "The contention is that, by Article V of the Amendments to the Federal Constitution, no person can 'be deprived of life, liberty or property without due process of law'; that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of the state courts; that this action of the Circuit Court is not to be considered a mere error in the progress of a trial; but a deprivation of property under the forms of legal procedure. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 51 L. Ed. 979, 17 Sup. Ct. Rep. 581, we held that a judgment of a state court might be here reviewed if it operated to deprive a party of his

property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said, p. 234 L. Ed., p. 983, Sup. Ct. Rep., p. 584:

> "'But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment, has said: "Can a state make anything due process of law, which by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation"' (Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. Ed. 616, 618).

"The * * * same question could be propounded and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the au-

thority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

And again (p. 236, 237, L. Ed., p. 985, Sup. Ct. Rep., p. 584):

"The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of his property without compensation."

"If a judgment of a state court can be reviewed by this court on error upon the ground that al though the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to), a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of those releases; that, notwithstanding this, that court came to its conclusion and rendered its judgment without any determination thereof; that the appellate courts wrongfully assumed that the trial court had decided the question, and rendered their judgments on that as-

sumption, so that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs to a share of the estate without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as conclusive determination of the fact. ALTHOUGH THESE PLAINTIFFS WERE PARTIES TO THE PROCEEDINGS IN THE STATE COURTS, AND PRESENTED THEIR CLAIM OF RIGHT, IF IT BE TRUE THAT THE NECESSARY RESULT OF THE COURSE OF PROCEDURE IN THOSE COURTS WAS A DENIAL OF THEIR RIGHTS—A TAKING AWAY AND DEPRIVING THEM OF THEIR PROPERTY WITHOUT ANY JUDICIAL DETERMINATION OF THE FACT UPON WHICH ALONE SUCH DEPRIVATION COULD BE JUSTIFIED—A CASE IS PRESENTED COMING DIRECTLY WITHIN THE DECISION IN 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. Giving effect in the Circuit Court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits, and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the state courts

and the necessary result therefrom. We are of opinion that the jurisdiction of this court must be sustained."

Your Honors will note and appreciate the significance of the conclusion of the Court, quoted above, in the following language:

"Although these plaintiffs were parties to the proceedings in the state courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their prpoerty **WITHOUT ANY JUDICIAL DETERMINATION OF THE FACT UPON WHICH ALONE SUCH DEPRIVATION COULD BE JUSTIFIED** —a case is presented coming directly within the decision in 166 U. S. 226."

See, also, Windsor v. McVeigh, 93 U. S. 74.

The principles applied in the foregoing cases are fundamental in the administration of justice. Their application to the case before your Honors will result in relieving the Wagner Company from a judgment as unjust as it is invalid. The Wagner Company today finds itself in this situation: It made a contract by which it undertook to pay certain royalties **IF** it elected to accept a license from Lyndon. No Court has yet decided that it elected to accept such a license. Nevertheless, there has been imposed upon it a judgment for the royalties which it was only liable to pay, if it elected to accept such a license. And, since the judgment complained of was rendered,

another judgment for approximately the same amount has been rendered against it for subsequent royalty installments, which judgment was obtained merely by the application of the rule of res adjudicata. And, so, the Wagner Company finds itself with successive judgments and a continuing liability imposed upon it, by reason of the judgment which is now involved in this case, which judgment we claim is absolutely void, because rendered in violation of the constitutional guarantee.

The motion to dismiss denies that a federal question is involved. It is not pretended that the question presented on this appeal is foreclosed by prior decisions of this Court. As to that ground, therefore, the motion should be overruled.

As to the claim that the questions presented are frivolous, appellant can only say that its persistence, in asserting what it conceives to be its rights, is evidence of its good faith, and it submits to your Honors that it ought not to be denied a hearing upon the merits, where the amount involved is so large, and where the questions involved are so important, because they relate to the administration of justice and the powers of the judiciary as affected by the due process clause of the Constitution.

CHARLES A. HOUTS,
ALBERT BLAIR,
Attorneys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC COMPANY,
Appellant,
vs.
LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis,
Respondents.
No. 738.

SEPARATE MOTION TO DISMISS OF CHARLES E. MOHRSTADT, SHERIFF.

CLARENCE T. CASE,
Attorney for said Sheriff.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 919.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC COMPANY, Appellant, vs. LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis, Respondents.	No. 738.

SEPARATE MOTION TO DISMISS OF CHARLES E. MOHRSTADT, SHERIFF.

Comes now Charles E. Mohrstadt, Sheriff of the City of St. Louis, one of the respondents in the above-entitled cause, and respectfully moves the Court to dismiss the appeal herein, for the reason that, on the face of the record, there is no constitutional question before this Honorable Court for its decision.

Wherefore, the premises considered, this respondent prays that said appeal be dismissed.

CHARLES E. MOHRSTADT,
Sheriff of the City of St. Louis, Missouri.

CLARENCE T. CASE,
Attorney for said Sheriff.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC COMPANY,
Appellant,

v.

LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis.

No. 738.

MOTION TO DISMISS OR AFFIRM

and

BRIEF IN BEHALF OF LAMAR LYNDON, APPELLEE.

JOHN D. RIPPEY,
LAWRENCE C. KINGSLAND,
Counsel for Lamar Lyndon, Appellee.

St. Louis Law Printing Co., 415 N. Eighth St. Main 1819, Central 913.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

WAGNER ELECTRIC COMPANY, Appellant, v. LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis.	No. 738.

MOTION TO DISMISS OR AFFIRM.

Now comes Lamar Lyndon, one of the appellees in the above-entitled cause, and moves the Court to dismiss the appeal in this case, or to affirm the decree of United States Circuit Court of Appeals for the Eighth Circuit, for the following reasons, to wit:

1. That it appears from the record that there is no constitutional question involved, and that therefore the decision and judgment of the United States Circuit Court of Appeals is final.

2. That it is manifest from the record that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

and it is manifest that the appeal was taken for delay only.

Wherefore, appellee prays that the appeal be dismissed, or that the judgment of the Circuit Court of Appeals for the Eighth Circuit be affirmed with just damages to appellee for his delay.

John D. Rippey,
Lawrence C. Kingsland,
Counsel for Lamar Lyndon, Appellee.

NOTICE.

Please take notice that on the 30th day of April, 1923, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief of appellee in support of this motion.

John D. Rippey,
Lawrence C. Kingsland,
Counsel for Lamar Lyndon, Appellee.

BRIEF IN BEHALF OF APPELLEE, LAMAR LYNDON.

STATEMENT.

The present suit arose out of a controversy that originated in the state courts of Missouri.

On May 10, 1917, appellee Lamar Lyndon instituted a suit in the Circuit Court of the City of St. Louis, Missouri, against the appellant Wagner Electric Manufacturing Company. The state court action was founded on a contract and was for the recovery of certain royalties due the appellee Lyndon from the appellant Wagner Company. The Wagner Company was duly served, answered and the cause came on for trial before the Court sitting with a jury, on December 4, 1917. Evidence was introduced by both parties, and, at the close of all the evidence, the Court instructed the jury to find a verdict in favor of appellee Lyndon; the jury so found and the Court entered a judgment upon said verdict. The appellant Wagner Company thereupon filed its motion for a new trial. The motion for new trial was overruled and the Wagner Company thereupon appealed to the Supreme Court of Missouri. The appeal was duly assigned to Division No. 1 of the

Supreme Court of Missouri, comprising four judges as provided by the Constitution of Missouri in the Amendment of 1890, reading, in part, as follows:

> "Section 1. **Number of Judges—Divisions of Court—Business Divided—Quorum.**—The Supreme Court shall consist of seven judges, and * * * shall be divided into two divisions, as follows: One division to consist of four judges of the court and to be known as Division No. 1. * * * A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court."

Thereafter, on January 21, 1920, the appeal was argued and submitted to the Court. Three of the Judges of Division No. 1 heard the argument, and full printed arguments were filed by both parties. Thereafter, on July 19, 1920, the Supreme Court of Missouri entered its judgment affirming the judgment of the trial court, and filed an opinion which was concurred in by the full court, said opinion being signed by A. M. Woodson, J., who was a member of the court at the day of the argument, but who was not present on the Bench on the date of the argument. After the judgment of the Supreme Court of Missouri had been entered and the opinion filed, the Wagner Electric Company filed its motion for a re-

hearing in the Supreme Court of Missouri, which motion was overruled. Thereafter, the Wagner Company filed a motion to transfer the cause to the Court en banc, which motion was overruled.

The Wagner Company thereupon filed in this Court its petition for a writ of certiorari to review said judgment of affirmance by the Supreme Court of Missouri. The grounds for the petition for writ of certiorari included the same matters now presented on this appeal. The petition for writ of certiorari was denied by this Court April 11, 1921 (Wagner v. Lyndon, 256 U. S. 690). Thereafter, the mandate of the Supreme Court of Missouri having passed to the Circuit Court of the City of St. Louis, Missouri, the Circuit Court of the City of St. Louis issued its execution to the Sheriff of the City of St. Louis, and the Sheriff made a levy under said execution. Thereupon, the Wagner Company filed a bill in equity against Lamar Lyndon in the United States District Court at St. Louis, seeking an injunction preventing Lyndon from proceeding with said execution. Application for preliminary injunction in said suit was heard by the District Court and was denied. The Wagner Company thereupon paid the judgment, interest and costs to the Sheriff of the City of St. Louis in the sum of fifteen thousand fifteen dollars and twenty-nine cents ($15,015.29). After said sum had been paid to the Sheriff of the City of St. Louis, the

appellant instituted the present suit in the District Court of the United States for the Eastern Division, Eastern District of Missouri, against the appellee, Lamar Lyndon, and the Sheriff of the City of St. Louis, alleging among other matters that it, the Wagner Company, had been deprived of its property without due process of law and denied equal protection of the law, basing these allegations on the action of the Circuit Court of the City of St. Louis, Missouri, in directing a verdict for Lamar Lyndon, and on the participation of Judge Woodson of the Supreme Court of Missouri in the decision of the cause by the Supreme Court of Missouri, when he had not heard oral argument of the cause.

Appellant's bill of complaint asks for an injunction restraining the Sheriff of the City of St. Louis from paying the money over to appellee Lamar Lyndon, and for a recovery of the fund from the Sheriff. Motions to dismiss the bill of complaint were filed by the Sheriff of the City of St. Louis and by Lamar Lyndon. Thereafter, the District Court dismissed the bill of complaint on the ground that there were no facts alleged entitling the plaintiff to maintain the suit. The opinion of the District Court dismissing the bill of complaint appears in the present record at page 27 et seq. The Wagner Company appealed from the order dismissing the bill of complaint to the

United States Circuit Court of Appeals for the Eighth Circuit.

The appeal came on to be heard before the United States Circuit Court of Appeals for the Eighth Circuit, and said court filed an opinion and entered its decree affirming the decree of the District Court. The opinion of the Court of Appeals for the Eighth Circuit appears on pages 39 et seq. of this record. The Wagner Company thereupon filed a petition for writ of certiorari in this court, and at the same time took the present appeal. This Court denied the application for writ of certiorari February 26, 1923.

On this state of the record the appellee Lamar Lyndon now moves this Court to dismiss the appeal for the reason that it does not involve a federal question, or to affirm the judgment of the Circuit Court of Appeals for the Eighth Circuit for the reason that the questions presented are frivolous and that the appeal is taken for delay only.

It is apparent from the assignment of errors (Rec., p. 48) that the appellant contends:

(1) That direction of a verdict in favor of Lamar Lyndon in the state trial court deprived appellant of its rights under the Fourteenth Amendment of the Constitution of the United States; and

(2) That the action of the Supreme Court of the State of Missouri in causing Judge Woodson of that

court, and who was not present at the oral argument to write an opinion, in which all the judges concurred was a denial of due process.

(3) That the failure of the Supreme Court of Missouri to transfer to Court en Banc was a denial to appellant of due process of law.

BRIEF AND ARGUMENT.

The Record Shows No Denial of Trial by Jury.

The appellant contends that the action of the state trial court in directing a verdict for Lyndon violated the due-process clause of the Constitution of the United States. In the first place, the trial in the state court was a jury trial in conformity with the practice and procedure as approved by the Supreme Court of Missouri. It was for the state trial court to determine as a matter of general law the construction of the contract sued on and to determine the question as to whether the undisputed evidence showed, as a matter of law, liability under the contract.

A federal court will not go into the question as to whether the law as applied by the trial court was right or wrong. The contention of appellant, therefore, that a judgment was rendered without sufficient proof is not a federal question (*United States v. Norsch*, 42 Fed. 417).

This Court, in *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 674, has expressly held that even an erroneous direction of a verdict by the trial court cannot be relied upon as raising a federal question under the Constitution of the United States.

Denial of Trial By Jury Not Denial of Due Process.

Moreover, even if the action of the trial court were construed to be a denial of trial by jury, such a denial would not amount to denial of due process. By a long line of decisions of this Court, and other federal tribunals, it has been held that a trial by jury in suits at common law in the state courts is not a privilege or immunity of national citizenship that the states are forbidden by the Fourteenth Amendment to abridge.

> Walker v. Sauvient, 92 U. S. 90;
> Frank v. Mangum, 237 U. S. 309;
> Gibson v. Billingham, 213 Fed. 488;
> Friedemann v. United States, 227 Fed. 732;
> Raymond v. Chicago, 233 Fed. 289.

In the case of *Walker v. Sauvient, supra,* Chief Justice Waite said:

> "A trial by jury in suits at common law pending in the state court is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge. * * * Here the state court has decided that the proceeding below was in accordance with the law of the state; and we do not find that to be contrary to the Constitution or any law or treaty of the United States."

The Supreme Court, in the case of *Frank v. Mangum, supra*, said:

> "Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. * * * The trial by jury is not essential to it, either in civil causes (Walker v. Sauvient, 92 U. S. 90) or in criminal cases."

It follows, therefore, that since the course of procedure followed by the Circuit Court of the City of St. Louis has been approved as the law of the state by the Supreme Court of Missouri, it is a question settled beyond interference by a federal tribunal.

Oral Hearing Not Element of Due Process.

Likewise, the fact that one of the Judges of the Supreme Court of Missouri who chanced to write the opinion of the Court failed to hear the oral argument does not involve a federal question.

Under the provisions of the State Constitution quoted (p. 6, *ante*) a majority of the court constitutes a quorum of the court, and the decision of the Su-

preme Court of Missouri was a unanimous decision of the court. No denial of due process or equal protection of the law under the Constitution was in anywise involved by the action of the Court, which resulted in the opinion being written by Judge Woodson.

In *Thompson on Trials*, paragraph 920, it is said:

> "It is conceived that a distinction must be taken between the right to *appear* and *defend* by counsel and the right to be *heard in argument* by counsel. * * * Clearly, it is within the power of the court, in a civil case, to dispense with this aid or help, where it is not necessary."

In the case of *Wall v. Old Colony Trust Co.*, 177 Mass., *l. c.* 277, the Court said:

> "We should hesitate to say that there is anything in the Constitution, either of this state or of the United States, which expressly or implicitly prevents a court of last resort from prescribing absolutely by rule that arguments upon questions of law, brought from an inferious tribunal, shall be presented only in writing or in print."

In the case of *Golden Gate Lumber Co. v. Sharbacker*, 105 Cal. 114, the Court said:

> "Upon the conclusion of the evidence the court declined to hear an oral argument of the case, but gave the attorneys the privilege of filing briefs. Appellant insists that he had a legal

right to orally argue the case to the court. We have no doubt that the court, in the exercise of its discretion, had the right to decline to hear oral argument."

Certainly, the Supreme Court of Missouri, having reached a unanimous decision, had the full right without abridgement of any constitutional right of the appellant to assign to Judge Woodson the duty of preparing the opinion in the case. The Supreme Court of Missouri, in *Chovin v. Wagner*, 18 Mo. 531, has held that the reasons stated in an opinion are no part of the decision of the Court.

Moreover, it will be remembered that this Court had presented to it by appellant these same questions in the application for writ of *certiorari* from the state court (*Wagner v. Lyndon*, 256 U. S. 690). This was the only method for the review of the questions that were present in the state court record that was open to appellant. The effect of the denial of the writ by this Court was to give finality to the state court judgment, and the present suit is merely an attempt to attack collaterally a final state court judgment upon grounds present in the former record.

The Appeal is Frivolous and Manifestly Taken For Delay Only.

Aside from the question of jurisdiction, it is manifest that the bill of complaint is entirely without equity. The bill of complaint seeks an injunction

against the Sheriff of the City of St. Louis from paying over to appellee Lamar Lyndon funds in his hands made on an execution issued out of the state court, and seeks to have declared a trust in the funds for the benefit of the appellant.

The basic distinction between a case in which federal courts have upheld jurisdiction to enjoin the enforcement of state court judgments and cases in which such jurisdiction has been refused, is that where the appeal is predicated on independent equities arising outside of the record of the state court and involving fraud, accident or mistake the bill may be sustained; otherwise where the attack on the state court judgment is predicated upon alleged errors or irregularities inherent in the record of the state court, jurisdiction by the federal court has universally been refused.

> Central Land Co. v. Laidley, 159 U. S. 103;
> Surety Co. v. Bank, 120 Fed. 593;
> United States v. Morris, 262 Fed. 514;
> Little Rock Ry. Co. v. Burke, 66 Fed. 83.

In the case of *Central Land Co. v. Laidley*, 159 U. S. 103, Mr. Justice Gray said:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive

the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States" (citing Walver v. Sauvient, 92 U. S. 90; Head v. Amoskeag Mfg. Co., 113 U. S. 9; Morley v. Lake Shore R. R., 146 U. S. 162; Bergemann v. Backer, 157 U. S. 655).

In *Surety Co. v. Bank*, 120 Fed. 383, in speaking for the United States Circuit Court of Appeals, Judge Sanborn said:

> "The indispensable elements of such a cause of action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant, and (5) the absence of any adequate remedy at law."

In the case of *United States v. Morris*, 262 Fed. 514, Judge Lewis held that in a case where funds were in the hands of a sheriff and it was sought to declare a trust in the funds for the benefit of a plaintiff, the Court was without power to entertain the suit against the Sheriff to require him to disregard the orders of the state court.

In *Little Rock Ry. Co. v. Burke*, 66 Fed. 83, Judge Thayer held that federal courts have no jurisdiction

of a suit to set aside a decree of a state court on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal or bill of review in a court which made the decree is the proper and sufficient remedy.

There is nothing in any decision of this Court, so far as counsel has been able to discover, which would, even remotely, justify the maintenance of the bill of complaint on any theory. There is certainly nothing in the case of *Simon v. Southern Ry. Co.*, 236 U. S. 115, relied upon below by appellant, to sustain the equity of the bill. This Court there said:

> "Where a state court had jurisdiction of the person and subject matter a judgment rendered in the suit would be binding on all the parties until reversed, and there would, therefore, usually be no equity in a bill in a federal court seeking to enjoin against the enforcement of a state court judgment thus binding between the parties."

Wells Fargo & Co. v. Taylor, 254 U. S. 183, another case relied upon by the appellant below, was a case in which the Wells Fargo Company had no opportunity to present the question that was made the basis of an independent suit in equity to enjoin the enforcement of a judgment obtained in a state court by Taylor. This Court expressly said:

> "The judgment (state court judgment) was obtained in an action to which that company was not a party and wherein it could not be heard."

Counsel submits that it is so clear and beyond question that the only cases in which a federal court has ever assumed jurisdiction to enjoin the enforcement of a state court judgment are those in which the suit is based on facts and matters that were not involved in the state court record, that contentions to the contrary are "so frivolous as not to need further argument."

The decisions, both of the District Court (Rec., p. 27) and of the Court of Appeals (Rec., p. 29) are so clearly right that an attempt by the present appeal to resubmit the questions for decision by this Court is manifestly for delay only.

On the Question of Damages For Delay.

It appears from the decisions of this Court that, under Sections 1010 and 1012, U. S. Revised Statutes, this Court has the power to assess just damages either upon the dismissal of an appeal or the affirmance of a judgment where the appeal raises unsubstantial or frivolous questions.

In the case of *Deming v. Carlisle Packing Co.*, 226 U. S. 102, damages were allowed because the asserted federal right was of an unsubstantial and frivolous character.

We respectfully submit that in this case the record justifies an application of the statute. The amount in controversy is fifteen thousand fifteen dollars and

twenty-nine cents ($15,015.29). An award of damages for the delay of ten (10) per cent of this amount apparently would be in conformity with the established practice of this Court.

Conclusion.

In view of the foregoing we respectfully urge that the appeal either be dismissed or that the judgment of the Circuit Court of Appeals for the Eighth Circuit be affirmed, and that the appellant be awarded as damages ten (10) *per cent* of the sum in controversy.

Respectfully submitted,

JOHN D. RIPPEY,
LAWRENCE C. KINGSLAND,
Counsel for Appellee, Lamar Lyndon.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

WAGNER ELECTRIC MANUFACTURING COMPANY, a Corporation,
Petitioner,
v.
LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis,
Respondents.

No. 738

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

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WAGNER ELECTRIC MANUFACTURING COMPANY, a Corporation,
Petitioner,
v.
LAMAR LYNDON and CHARLES E. MOHRSTADT, Sheriff of the City of St. Louis,
Respondents.
No.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Petitioner, Wagner Electric Manufacturing Company, a corporation, prays for a writ of certiorari to review a final judgment of the United States Circuit Court of Appeals for the Eighth Judicial Circuit in the case of Wagner Electric Manufacturing Company, a corporation, appellant, versus Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, appellees, which case went to the United States Circuit Court of Appeals for the Eighth Judicial Circuit on appeal from a judgment of the District Court

of the United States for the Eastern Division of the Eastern Judicial District of Missouri. The judgment of the last mentioned court, appealed from as aforesaid, dismissed appellant's (your petitioners') petition upon the ground that it did not state a case justifying the relief prayed for.

The facts to be considered by the Court, therefore, are those set out in the petition and the accompanying exhibit to it. They are as follows: On the 2nd of March, 1912, the defendant Lyndon was the owner of a patent upon a device for propelling and charging electric vehicles. This patent had been issued in 1906. On the date first mentioned (March 2, 1912) he entered into an option contract with petitioner, Wagner Electric Manufacturing Company, granting it the right to elect between purchasing the patent outright, or to manufacture and sell the device under an exclusive license. For this right of election the Wagner Company paid him $1,750.00. By the terms of the contract, if the Wagner Company elected to purchase the machine it was to pay a definite fixed price; if it elected to operate under a license it was to pay a royalty upon each machine sold, but the total annual royalties were not to be less than $3,000.00 a year. At the time the contract was made no machines embodying the features described in the patent had ever been built. As soon as the option contract was signed, the Wagner Company proceeded to build an experimental machine, which proved to be a failure. It thereupon attempted to abandon its contract altogether. This attempted abandonment took place approximately six months after the making of the contract. It never built any machine other than the experimental one; it never sold or offered for sale

any of said machines, and never, at any time, exercised, or attempted to exercise, any rights under the patent.

In this situation, some five years afterwards (May 10, 1917), Lyndon brought a suit in the Circuit Court of the City of St. Louis, Missouri, for the minimum royalties of $3,000.00 a year mentioned in the contract. In this suit he specifically alleged, and based his right to these royalties upon the claim, that the Wagner Company had exercised its right of election granted it by the contract, and had elected to avail itself of the privilege to manufacture and sell said machines upon the exclusive license basis.

To the petition thus filed by him, the Wagner Company, in due time, answered, denying that it had elected to avail itself of the exclusive license privilege granted by the contract, asserting, on the contrary, that it had abandoned and withdrawn altogether from the contract between it and Lyndon.

The case in due course came on for trial in the Circuit Court of the City of St. Louis, before Judge Karl Kimmel and a jury. Lyndon was the only witness on his side of the case. Upon the question, whether or not the Wagner Company had elected to avail itself of the exclusive license privilege of the contract, Lyndon testified as follows:

> Mr. Kingsland (continuing): Q. Did the company avail itself of the privilege of purchasing the patent outright, or did they elect to proceed under the patent as a licensee?
>
> Mr. Honts: I object to that as immaterial.
>
> The Court: That is one of the things whether they availed themselves of the privilege——

Mr. Kingsland: I will confine the question, therefore, as to whether the defendant company availed themselves of the right to purchase outright.

The Court (addressing witness): You may answer that question.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted and still continues to except.

The Witness: A. I never understood that it was the intention of the company to purchase outright.

Mr. Houts: I object to that and move that it be stricken out.

The Court: The objection is sustained, and the motion to strike out is sustained. (Addressing witness): You are asked whether or not they purchased this patent outright; you can answer by saying "yes" or "no." A. I have never been sure, your Honor; they had the option of doing two things.

The Court: Q. Did you ever get $24,000 for this patent? A. Never; they never purchased it.

The Court: They never purchased it? A. No.

He produced no other evidence upon this question, and your Honors will observe from his testimony, as quoted above, Lyndon went no further than to say that the Wagner Company, although it "had the option of doing two things" had **not** elected to **purchase.** He did not pretend to say that the Wagner Company had, as charged in his petition, elected to operate under an exclusive license.

For the Wagner Company, defendant in that suit, Mr. W. A. Layman, its president, was the only witness.

He testified that the Wagner Company had at no time elected to operate under an exclusive license nor had it elected to purchase the patent.

There was no other testimony on either side of the case upon this question.

At the conclusion of all the evidence defendant, Wagner Company, asked the Court to submit to the jury the question whether or not the Wagner Company had made an election to operate under an exclusive license as claimed in the petition by the following offered instruction:

> "The Court instructs the jury that under the contract the defendant was given the right to choose between purchasing the patent outright or to operate under an exclusive license thereunder. If you believe and find from the evidence that the defendant did not elect either to purchase outright or to operate under an exclusive license, then your finding must be for the defendant."

This the Court refused to do, and on the contrary gave a peremptory instruction to the jury to find for the plaintiff; the instruction given being as follows:

> "The Court instructs the jury that under the contract sued on, defendant became bound to pay plaintiff for the third year, mentioned therein, namely, from March 2, 1914, to March 2, 1915, and each year thereafter, the sum of three thousand dollars ($3,000.00) per year as royalty for the enjoyment of the rights under the patent mentioned in the contract, said royalty to be paid in advance, one-half in January and the balance in July of each year; that under the contract defendant's obliga-

tion to pay the royalty was absolute, unless at the expiration of two years from the date of the contract, namely, two years from March 2, 1912, defendant terminated the agreement in compliance with its terms.

You are further instructed that the defendant did not terminate the contract in the manner and within the time specified therein. You will return your verdict, therefore, for plaintiff in the sum of ten thousand five hundred dollars ($10,500.00), with interest from the dates each installment became due, as set out in the plaintiff's petition, to-wit:

Interest at the rate of six per cent per annum on the following amounts:

On $1500 from January 1, 1914, to date;
On $1500 from July 1, 1914, to date;
On $1500 from January 1, 1915, to date;
On $1500 from July 1, 1915, to date;
On $1500 from January 1, 1916, to date;
On $1500 from July 1, 1916, to date;
On $1500 from January 1, 1917, to date."

Under this instruction the jury returned a verdict against the Wagner Electric Manufacturing Company for twelve thousand and twenty-nine dollars and fifty cents ($12,029.50).

From this judgment an appeal was taken to the Supreme Court of the State of Missouri. That court consists of two divisions, namely, Division No. 1 and Division No. 2. The case was assigned to Division No. 1, consisting of four judges.

Pursuant to the Constitution and laws of Missouri,

it was set down for oral argument before the Judges of that division. When it came on to be argued, Judge Woodson, a member of Division No. 1, was absent. It was duly argued before the other three Judges of the Division. Thereafter an opinion was handed down by Division No. 1 affirming the judgment of the Circuit Court of the City of St. Louis. The opinion contained no reference whatever to the claim of the Wagner Company that no evidence had been introduced in the trial court of the Wagner Company's having elected to operate under an exclusive license, which, under the provision of the contract, and under the allegations of the pleadings, was a prerequisite to any obligation to pay royalties. This opinion was written by Judge Woodson, who, as stated above, was absent at the time of the oral argument before Division No. 1, and who participated in the decision without ever having accorded the Wagner Company the right of oral argument before him, a right which the Constitution of Missouri accords to every litigant.

Upon the filing of this opinion the Wagner Company filed a motion for a rehearing, and also a motion to have the cause transferred to the court en banc, the latter motion being based upon the ground that Judge Woodson's participation in the decision of the case, without the Wagner Company having been accorded the right of oral argument before him was a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States, and that thereby a Federal question was presented, which, under the Constitution of the State of Missouri, required that the cause be transferred to the court en banc for reargument before the entire court. Both of these motions were denied.

The Wagner Company then, unsuccessfully, petitioned the United States Supreme Court for a writ of certiorari, and when its petition was denied, Lyndon, through his attorneys, then started to enforce the judgment of the Circuit Court of the City of St. Louis, by causing an execution to issue against the property of the Wagner Company. Under this execution valuable property was levied upon and advertised for sale, to avoid which the Wagner Company, under protest, paid to the Sheriff of the City of St. Louis, Missouri, the sum of fifteen thousand and fifteen dollars and twenty-nine cents ($15,015.29), representing the amount of the judgment, interest and costs.

While this money was still in the hands of the Sheriff of the City of St. Louis, Missouri, the Wagner Company instituted this suit in the United States District Court to have this fund declared a trust fund in the hands of the Sheriff, to which the Wagner Company is entitled, because wrongfully coerced from it in execution of a void judgment against the Wagner Company. It claims that the judgment obtained by Lyndon against it is void, and its enforcement constitutes a taking of its property without due process of law, and without its having received the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The District Court of the United States as aforesaid rendered a judgment dismissing appellant petition upon the ground that such petition did not state a cause justifying the relief asked for. An appeal from this judgment or decree was duly taken to the United States Circuit Court of Appeals for the Eighth Circuit, wherein an opinion was written by District Judge Trieber

(the late Circuit Judge Carland and District Judge Munger sitting with him), 282 Fed. 219. The decree of the District Court was affirmed by the Circuit Court of Appeals, and it is your petitioner's contention that said Circuit Court of Appeals erred as follows:

1. Said Circuit Court of Appeals erred in holding in effect that the action of the Circuit Court of the City of St. Louis, in giving the peremptory instruction hereinabove discussed, could constitute any more than an error in the application of the law, at the trial, and that the United States Circuit Court of Appeals could grant no relief.

2. The Circuit Court of Appeals erred in holding that the giving of a peremptory instruction, directing a verdict in favor of plaintiff, when there is no evidence to support such verdict, does not deprive defendant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals erred in holding that your petitioner's contention that it had been deprived of its property without due process of law, in that the opinion of the Supreme Court of Missouri was prepared by a member of the court who was not present at the oral argument, was without merit.

4. The Circuit Court of Appeals erred in ignoring the point urged by your petitioner, that the refusal of Division No. 1 of the Supreme Court of Missouri to transfer the case to the court en banc for reargument, after the Wagner Company had asserted that a Federal question had been brought into the case by the participation in the decision of a Judge who was absent

from the oral argument, constituted a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The Consitution of Missouri plainly provides that when a Federal question appears in a case which is being heard in Division, that such case should be transferred to the court en banc.

Your petitioner states that the above questions are questions of supreme importance, because they involve in their final analysis a determination as to how far, under the forms of law, arbitrary power may be exercised by not mere legislative or executive officers, but those clothed with judicial power.

Wherefore, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, commanding that court to certify the cause of Wagner Electric Manufacturing Company, appellant, v. Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, appellees, to this court for review and determination, as provided by law, and that your petitioner may have such other and further relief in the premises as to this court may seem proper.

CHARLES A. HOUTS,
Attorney for Petitioner.

SUGGESTIONS IN SUPPORT OF PETITION.

Foreword.

Petitioner, Wagner Electric Manufacturing Company, is asking the Court to issue its writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit. Petitioner has already prosecuted an appeal to this Court from the judgment referred to. This double method of invoking the jurisdiction of this Court has been resorted to, because of some doubt as to which of the two methods is the proper one to be employed under the circumstances.

The Case Presented.

The case presents two questions of vital importance arising under the "due process" and "equal protection" clauses of the Constitution of the United States.

The first of these questions is:

> **Can a state court arbitrarily direct a jury to return a verdict in favor of a plaintiff without submitting to the jury for determination the principal question raised by the pleadings, without a determination of which no judgment could be rendered against the defendant?**

The second:

> **Upon an appeal being taken from such a judgment, can a judge of the Supreme Court of the State of Missouri (whose Constitution guarantees to an appellant a hearing before the Supreme**

Court) participate in the decision of the case and write the opinion of the court affirming the judgment of the trial court, without having been present at the hearing in that court?

The two questions just stated were presented to the United States District Court for the Eastern Division of Missouri by petitioner's petition filed in that court, wherein petitioner sought relief in equity against a judgment of the Circuit Court of the City of St. Louis, Missouri, which had been affirmed on appeal by the Supreme Court of the State of Missouri. The defendants named in that petition filed motions to dismiss, in the nature of demurrers to the petition, conformable to the present equity practice. The District Court sustained the motions to dismiss, and from that judgment an appeal was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment of dismissal was affirmed.

In appraising the correctness of the judgment of the District Court and of the Circuit Court of Appeals, the facts to be considered, therefore, are those set out in the petition and the accompanying exhibit to it. They are as follows:

On the 2nd of March, 1912, the defendant Lyndon was the owner of a patent upon a device for propelling and charging electric vehicles. This patent had been issued in 1906. On the date first mentioned (March 2, 1912), he entered into an option contract with petitioner, Wagner Electric Manufacturing Company, granting it the right to elect between purchasing the patent outright or to manufacture and sell the device under an exclusive license. For this right of election

the Wagner Company paid him $1,750.00. By the terms of the contract, if the Wagner Company elected to purchase the machine it was to pay a definite fixed price; if it elected to operate under a license it was to pay a royalty upon each machine sold, but the total annual royalties were not to be less than $3,000.00 a year. At the time the contract was made no machines embodying the features described in the patent had ever been built. As soon as the option contract was signed, the Wagner Company proceeded to build an experimental machine, which proved to be a failure. It thereupon attempted to abandon its contract altogether. This attempted abandonment took place approximately six months after the making of the contract. It never built any machine other than the experimental one; it never sold or offered for sale any of said machines, and never, at any time, exercised, or attempted to exercise, any rights under the patent.

In this situation, some five years afterwards (May 10, 1917), Lyndon brought a suit in the Circuit Court of the City of St. Louis, Missouri, for the minimum royalties of $3,000.00 a year mentioned in the contract. **In this suit he specifically alleged and based his right to these royalties upon the claim that the Wagner Company had exercised its right of election granted it by the contract, and had elected to avail itself of the privilege to manufacture and sell said machines upon the exclusive license basis.**

To the petition thus filed by him, the Wagner Company, in due time, answered, denying that it had elected to avail itself of the exclusive license privilege granted by the contract, asserting, on the contrary,

that it had abandoned and withdrawn altogether from the contract between it and Lyndon.

The case in due course came on for trial in the Circuit Court of the City of St. Louis before Judge Karl Kimmel and a jury. Lyndon was the only witness on his side of the case. Upon the question whether or not the Wagner Company had elected to avail itself of the exclusive license privilege of the contract, Lyndon testified as follows:

> Mr. Kingsland (continuing): Q. Did the company avail itself of the privilege of purchasing the patent outright, or did they elect to proceed under the patent as a licensee?
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> Mr. Houts: I object to that as immaterial.
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> The Court: That is one of the things, whether they availed themselves of the privilege——
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> Mr. Kingsland: I will confine the question, therefore, as to whether the defendant company availed themselves of the right to purchase outright.
>
> The Court (addressing witness): You may answer that question.
>
> To which ruling of the Court the defendant, by its counsel, then and there duly excepted and still continues to except.
>
> The Witness: A. I never understood that it was the intention of the company to purchase outright.
>
> Mr. Houts: I object to that and move that it be stricken out.
>
> The Court: The objection is sustained, and the motion to strike out is sustained. (Addressing witness) You are asked whether or not they purchased this patent outright; you can answer by

saying "yes" or "no." A. I have never been sure, your Honor; they had the option of doing two things.

The Court: Q. Did you ever get $24,000 for this patent? A. Never; they never purchased it.

The Court: They never purchased it? A. No. (Transcript of Record, p. 18.)

He produced no other evidence upon this question, and your Honors will observe from his testimony, as quoted above, Lyndon went no further than to say that the Wagner Company, although it "had the option of doing two things" had **not** elected to **purchase.** He did not pretend to say that the Wagner Company had, as charged in his petition, elected to operate under an exclusive license.

For the Wagner Company, defendant in that suit, Mr. W. A. Layman, its president, was the only witness. (Transcript, p. 19.) He testified that the Wagner Company had, at no time, elected to operate under an exclusive license nor had it elected to operate under an exclusive license nor had it elected to purchase the patent. (Transcript, p. 21.)

There was no other testimony on either side of the case upon this question.

At the conclusion of all the evidence, defendant, Wagner Company, asked the Court to submit to the jury the question, whether or not the Wagner Company had made an election to operate under an exclusive license as claimed in the petition by the following offered instruction (Transcript, p. 7):

"The Court instructs the jury that under the contract the defendant was given the right to

choose between purchasing the patent outright, or to operate under an exclusive license thereunder. If you believe and find from the evidence that the defendant did not elect either to purchase outright or to operate under an exclusive license, then your finding must be for the defendant."

This the Court refused to do, and on the contrary gave a peremptory instruction to the jury to find for the plaintiff; the instruction given being as follows:

"The Court instructs the jury that under the contract sued on, defendant became bound to pay plaintiff for the third year, mentioned therein, namely, from March 2, 1914, to March 2, 1915, and each year thereafter, the sum of three thousand dollars ($3,000.00) per year as royalty for the enjoyment of the rights under the patent mentioned in the contract, said royalty to be paid in advance, one-half in January and the balance in July of each year; that under the contract defendant's obligation to pay the royalty was absolute, unless at the expiration of two years from the date of the contract, namely, two years from March 2, 1912, defendant terminated the agreement in compliance with its terms.

You are further instructed that the defendant did not terminate the contract in the manner and within the time specified therein. You will return your verdict, therefore, for plaintiff in the sum of ten thousand five hundred dollars ($10,500.00), with interest from the dates each installment became due, as set out in the plaintiff's petition, to-wit:

Interest at the rate of six per cent per annum on the following amounts:

On $1500 from January 1, 1914, to date;
On $1500 from July 1, 1914, to date;
On $1500 from January 1, 1915, to date;
On $15000 from July 1, 1915, to date;
On $1500 from January 1, 1916, to date;
On $1500 from July 1, 1916, to date;
On $1500 from January 1, 1917, to date."

Under this instruction the jury returned a verdict against the Wagner Electric Manufacturing Company for twelve thousand and twenty-nine dollars and fifty cents ($12,029.50).

From this judgment an appeal was taken to the Supreme Court of the State of Missouri. That court consists of two divisions, namely, Division No. 1 and Division No. 2. The case was assigned to Division No. 1, consisting of four judges.

Pursuant to the Constitution and Laws of Missouri, it was set down for oral argument before the Judges of that division. When it came on to be argued Judge Woodson, a member of Division No. 1, was absent. It was duly argued before the other three Judges of the division. Thereafter an opinion was handed down by Division No. 1 affirming the judgment of the Circuit Court of the City of St. Louis. The opinion contained no reference whatever to the claim of the Wagner Company that no evidence had been introduced in the trial court of the Wagner Company's having elected to operate under an exclusive license, which, under the provision of the contract, and under the allegations of the pleadings, was a prerequisite to any obligation to

pay royalties. This opinion was written by Judge Woodson, who, as stated above, was absent at the time of the oral argument before Division No. 1, and who participated in the decision without ever having accorded the Wagner Company the right of oral argument before him, a right which the Constitution of Missouri accords to every litigant.

Upon the filing of this opinion the Wagner Company filed a motion for a rehearing, and also a motion to have the cause transferred to the court en banc, the latter motion being based upon the ground that Judge Woodson's participation in the decision of the case, without the Wagner Company having been accorded the right of oral argument before him was a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and that thereby a Federal question was presented, which, under the Constitution of the State of Missouri, required that the cause be transferred to the court en banc for reargument before the entire court. Both of these motions were denied.

The Wagner Company, then, unsuccessfully, petitioned the United States Supreme Court for a writ of certiorari, and when its petition was denied, Lyndon, through his attorneys, then started to enforce the judgment of the Circuit Court of the City of St. Louis, by causing an execution to issue against the property of the Wagner Company. Under this execution valuable property was levied upon and advertised for sale, to avoid which the Wagner Company, under protest, paid to the Sheriff of the City of St. Louis, Missouri, the sum of fifteen thousand and fifteen dollars and twenty-nine cents ($15,015.29), representing the amount of the judgment, interest and costs.

While this money was still in the hands of the Sheriff of the City of St. Louis, Missouri, the Wagner Company instituted this suit in the United States District Court, to have this fund declared a trust fund in the hands of the Sheriff, to which the Wagner Company is entitled, because wrongfully coerced from it in execution of a void judgment against the Wagner Company. It claims that the judgment obtained by Lyndon against it is void, and its enforcement constitutes a taking of its property without due process of law, and without its having received the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States. It claims that that judgment is void because:

1. There was no evidence produced in support of the claim that the Wagner Company had elected to avail itself of the license privilege, which, under the contract, it had the right to accept. The acceptance of this license privilege was a prerequisite to its becoming liable for the royalties sued for.

2. The peremptory instruction from the trial court to the jury was arbitrary and oppressive and beyond the power of the Court.

3. The refusal of the trial court to permit the jury to pass upon the principal issue in the case, namely, the question whether the Wagner Company had elected to avail itself of the license provision of the contract, was a denial to the defendant of the right to a trial by jury.

4. The judgment was rendered and affirmed without the Court, the jury or the Supreme Court having considered or determined the principal question in the case, namely, whether the defendant had elected to avail itself of the licensed privi-

lege of the contract, without which election no obligation to pay the royalties sued for could arise.

5. The participation of Judge Woodson of the Supreme Court of Missouri in the decision of the case, without the Wagner Company's having had the right of oral argument before him, was a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

6. The refusal of Division No. 1 of the Supreme Court of Missouri to transfer the cause to the court en banc for reargument, after the Wagner Company had asserted that a Federal question had been brought into the case by Judge Woodson's participation in the decision without his having been present at the oral argument, constituted a denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

BRIEF AND ARGUMENT.

The petition disclosed that the defendant Mohrstadt therein is in possession of a fund of fifteen thousand dollars, which he coerced petitioner into paying by means of an execution issued upon a judgment rendered by the Circuit Court of the City of St. Louis, Missouri, in a suit brought by appellee Lyndon against the Wagner Electric Manufacturing Company. The Wagner Company claims that the judgment referred to was void for reasons hereinbefore and hereinafter stated, and that as the payment of the fifteen thousand dollars was coerced through seizure of its property under a void judgment, the taking of the fifteen thousand dollars was a wrongful act, and that the law implies a trust in appellant's favor in and to the fund so wrongfully acquired, which trust this suit seeks to establish.

That in such circumstances (assuming the judgment in question to be void), a trust is imposed upon the fund in favor of the rightful owner is made to appear by a consideration of the fundamental principles of equity jurisprudence and their application in the recorded decisions of the courts. Section 1047 of Pomeroy's Equity states the rule thus:

> "By the well-settled doctrine of equity, a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or vio-

lation of a fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him by a legal action upon an implied assumpsit: but in many instances a resort to the equitable jurisdiction is proper and often necessary."

Section 1053 of the same treatise states it in this way:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentation, concealments, or through undue influence, or duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust upon property thus acquired in favor of the one who is truly and equitably entitled to the same; although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hand of any subsequent holder, until a purchaser for it in good faith and without notice, acquires a higher right and takes the property relieved from the trust. The forms and varieties of these trusts which are termed ex maleficio or ex delicto, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy for damages against the wrongdoer."

In 39 Cyc, page 190, we find the rule stated:

> "A constructive trust may arise where one wrongfully takes possession or assumes control of property belonging to another."

See, also, Perry on Trusts, 3d Ed., Sec. 192.

Assuming, therefore, that (as we shall attempt to point out) the judgment in question was void, and the funds in the hands of the Sheriff in reality and in good conscience belong to the Wagner Company, the next question presented is, did the District Court have jurisdiction and the power to compel a return of the money to the Wagner Company, and enjoin defendant Lyndon from receiving the benefit of his void judgment? We say that the District Court did have such jurisdiction and power. Paragraph 14 of Section 24 of the Judicial Code, the original of which was passed by Congress following the adoption of the Fourteenth Amendment, is as follows:

> Sec. 24. **(Original Jurisdiction.)** The district courts shall have original jurisdiction as follows:
>
> Fourteenth. **(Of Suits to Redress the Deprivation, Under Color of Law, of Civil Rights.)** Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The Fourteenth Amendment contained a guaranty of due process and equal protection of the law. The section above quoted was passed for the purpose of lodging in the District Court the jurisdiction to make effective the rights secured by the Fourteenth Amendment. Among these rights was the right of due process and equal protection.

Cuyahoga River Power Co. v. Akron, 240 U. S. 462;
Truax v. Raich, 239 U. S. 33;
Crane v. Johnson, 233 Fed. 334.

Assuming, therefore, that jurisdiction was properly lodged in the District Court because of the Federal question involved, the next question that presents itself is, did the District Court have the power to deprive defendant Lyndon of the benefit of a judgment which was void because lacking in due process and which deprived appellant of the equal protection of the law?

That Federal courts can, and will, deprive a plaintiff in the State courts of the benefits of a judgment, which is void because of jurisdictional defects in the process by which it was obtained, has been definitely settled by the case of Simon v. Southern Railroad Company, 236 U. S. 115.

In that case Simon obtained a judgment against the Railroad Company in Louisiana by service (under a Louisiana statute) upon the Assistant Secretary of State of Louisiana. The injury for which he sued occurred in Alabama. The Supreme Court of the United States held that the service on the Assistant Secretary of State was not valid. As to judgments in cases where

proper service is not had upon the defendant, the Supreme Court in the opinion in that case said:

> "Such judgments are not erroneous and not voidable, but, upon principles of natural justice, and under the due process clause of the Fourteenth Amendment, are absolutely void. They constitute no justification to plaintiff, who, if concerned in executing such judgments, is considered in law as a mere trespasser. (Citing cases.) On principle and authority, therefore, a judgment obtained in a suit of which the defendant had no notice was a nullity and the party against whom it was obtained was entitled to relief."

After pointing out that under the laws of Louisiana the Railroad Company might have filed an independent suit to set aside the judgment referred to, the opinion proceeds to say:

> "But, manifestly, if a new and independent suit could have been brought in a State court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal court, which was then bound to act within its jurisdiction and afford redress. (Citing cases.) United States courts could not stay original or supplementary proceedings in a State court (citing cases), or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from ENFORCING A VOID JUDGMENT."

And the Court in the Simon case, proceeding to apply the principles discussed in the opinion, enjoined Simon from enforcing the judgment, on the ground that the

judgment was void for want of notice to defendant of the pendency of the suit.

In a still more recent suit, that of Wells Fargo & Company v. Taylor, decided by the Supreme Court of the United States on December 6, 1920, and reported in January First Advance Opinions of the Supreme Court of the United States for the year 1920-21, at page 105, the Supreme Court again directed an injunction against the enforcement of a judgment. It had been obtained by Taylor against the Railroad Company in violation of an agreement Taylor had with the Wells Fargo & Company, his employer at the time of the injury. In that case Taylor had brought suit in Monroe County, Mississippi; had obtained proper service upon the Railroad Company; the Railroad Company appeared and defended; the Railroad Company attempted to avail itself of the benefits of the contract between Taylor and Wells Fargo & Comany, which exempted the Railroad Company from a suit for personal injury; the trial court had eliminated this contract as a defense, and a judgment had been entered, and an appeal had been taken to the Supreme Court of Mississippi; and the Supreme Court of Mississippi had affirmed Taylor's judgment. Notwithstanding the regularity of all the proceedings, and notwithstanding the fact that the lower court's judgment had been affirmed by the Supreme Court of Mississippi, the Supreme Court of the United States decreed that Taylor should not be permitted to enjoy the benefits of his judgment.

In that case the authorities are all reviewed, and the power of the Federal Court to prevent the execution of a judgment wrongfully obtained, was placed beyond any question.

The U. S. Circuit Court of Appeals for the 8th Circuit, dealing with the same question in a litigation between the National Bank of Commerce and Mr. H. Clay Pierce (268 Fed. 487) said:

> "The single question remains: Was the complainant's application for an interlocutory injunction to prevent the bank from collecting the judgment of $700,000, which it had obtained in the State court, until the claims of the plaintiff in this suit could be heard and determined, improvidently denied? The law intrusts the granting or refusal of temporary injunctions to the judicial equity, not of the appellate, but of the trial court. Its decision of this question, therefore, is presumptively right, and it ought not to be reversed or modified, unless it appears that it has disregarded some of the rulings or principles of equity established for its guidance or has seriously abused its discretion.
>
> "Stearns-Royer Mfg. Co. v. Brown, 114 Fed. 939, 941, 942, 52 C. C. A. 559; Stokes v. Williams, 226 Fed. 148, 156, 141 C. C. A. 146, 154. To sustain the denial of the injunction counsel for the bank invoked Section 720 of the R. S. (Compe. St. 1242), which provides that:
>
> " 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.'
>
> "But this section does not deprive the Federal courts, sitting in equity in cases involving any controversies between citizens of different states, of which such courts have jurisdiction, and which have been adjudged by the State courts, of the

power or relieve them of the duty to enjoin the parties to such suits from enforcing judgments of the State courts in their favor where, on account of fraud, mistake, accident or any other ground of equity jurisprudence, and on account of the threat of imminent and irreparable injury, the rules and principles of equity demand that the parties shall not proceed to enforce such state judgments. Marshall v. Homs, 141 U. S. 589, 596, 599, 12 Sup. Ct. 62, 35 L. Ed. 870; Simon v. Southern Ry., 236 U. S. 115, 124, 129, 35 Sup. Ct. 255, 59 L. Ed. 492; National Surety Co. v. State Bank, 120 Fed. 593, 600, 602, 56 C. C. A. 657, 61 L. R. A. 394; Schultz v. Highland Gold Mines Co. (C. C.) 158 Fed. 337, 340."

In the suit now before your Honors the petitioner invokes the application of the same principles to a different though (in legal effect) an equivalent state of facts. By reference to the pleadings and the contract set out in the opinion of the Supreme Court of Missouri attached thereto, it will be observed that the Wagner Company and the defendant Lyndon entered into a contract, by which the Wagner Electric Manufacturing Company was granted **the right to elect** between purchasing a certain patent, **or taking an exclusive license** to use, manufacture and sell the patented device. The contract provided that **if** the Wagner Company should **elect** to take an exclusive license, it should pay a certain minimum royalty. The suit by Lyndon in the Circuit Court of the City of St. Louis, Missouri, in which he obtained the judgment complained of, was for the minimum royalty specified in the contract. In that suit plaintiff's petition alleged that the Wagner Company **had elected to operate under an exclusive license.** De-

fendant denied that it had so elected. This was the main issue in the suit. The opinion of the Supreme Court of Missouri shows, and our petition alleges, that this issue was never decided. There is no pretense, and there has never been a pretense, that the evidence adduced in that suit tended to show that the Wagner Company had exercised its right of election, and had elected to operate under an exclusive license, and yet, by the pleadings in that case, and by the terms of the contract, the Wagner Company was liable to pay the royalties only IF IT ELECTED TO OPERATE UNDER A LICENSE. The petition in that case alleged:

> "That on the 2nd day of March, 1912, plaintiff and defendant entered into an agreement in writing wherein and whereby the defendant was granted and obtained THE RIGHT TO ELECT between the privilege of purchasing outright the patent hereinabove referred to, or operating thereunder under an exclusive license."

This allegation was followed by the further allegation:

> "That thereafter defendant, pursuant to the terms of said contract, ELECTED TO OPERATE UNDER AN EXCLUSIVE LICENSE," etc.

When the case came on for trial before the trial court the defendant sought, by offering an appropriate instruction, to have this question of fact decided by the jury. As stated above, and as shown by our petition herein, and as is also shown by the opinion of the Supreme Court of Missouri, no evidence had been offered to show that the Wagner Company had elected to operate under a license. On the contrary, the evidence

showed, beyond question, that the Wagner Company had never elected to operate under a license. But, in order that the points to be decided should be restricted to the issues raised by the pleadings, the defendant asked an instruction upon this question of election, which instruction the Court refused to give. And the record shows that the trial court withdrew all of the issues from the jury; that it gave a peremptory instruction to the jury to return a verdict for the amount sued for. Appellant's position here is that the trial court in so doing acted arbitrarily; that it completely ignored the petition, which was the foundation of Lyndon's suit, as though no petition had ever been filed. That while the Wagner Company had been summoned into court to answer to a charge that it had elected to operate under an exclusive license, yet, when it came into court, this charge was eliminated from the consideration of the jury, eliminated from the consideration of the Court and a judgment rendered upon the claim, MADE BY THE COURT, and never made by the plaintiff, viz.: That the Wagner Company had bound itself **absolutely** to pay the royalties in question, regardless of whether it had elected to operate under a license or not.

We claim that the Court did what it had no power to do. That its action was entirely beyond its jurisdiction.

The Wagner Company's position is that no judgment for royalties could be rendered by the Circuit Court of the City of St. Louis without that Court having first determined that the Wagner Company had elected to operate under a license; and that the Court having entered the judgment complained of, without first having

determined that the Wagner Company had elected to operate under a license, the judgment was arbitrary, a mere edict of the judge, and its enforcement constitutes the taking of plaintiff's property without due process.

The law applicable to this state of facts is best illustrated by the case of Fayerweather v. Ritch, 195 U. S. 276:

Mr. Fayerweather, a very wealthy man of New York, made a will which was violative of the statute of New York prohibiting a person from disposing of more than half of his property by will to charity. When the will came on for probate, his widow and certain heirs contested it, on the ground that it was in contravention of the statute mentioned. During the pendency of the probate proceeding, a compromise was made with the widow and contesting heirs, by which, for valuable considerations, each consented to the probate of the will, and released any claims against the trustees for the property which would have come to them but for these releases. The will was thereupon probated. Subsequently, certain colleges made beneficiaries by the will brought suit againts the trustees and against the widow and other heirs to establish their rights to certain of this property, which they claim the trustees held in trust for the plaintiffs in that suit. Mrs. Fayerweather and the other heirs who had executed the releases referred to, filed answers and counterclaims repudiating the releases, claiming that they had been procured by fraud. Upon the issues raised by the petition and the counterclaims, the case went to trial in the State courts of New York, and a judgment was entered against Mrs. Fayerweather and the heirs referred to. From this judgment appeals were taken to the general term of the Supreme Court of that State,

and from there to the Court of Apepals of New York, in both of which courts the judgment of the lower court was affirmed.

Thereupon the defeated heirs brought suit in the United States Court of New York to establish their right to the property in question, to which suit the judgment of the State court was pleaded as *res adjudicata*. This was the suit that reached the Supreme Court of the United States. In this suit the plaintiffs claim that they by proper pleading attacked the validity of the releases in question, on the ground of fraud, and that evidence had been introduced to sustain the charge of fraud, but that the trial court had not decided that particular issue, and that the courts to which appeals were taken had likewise failed to decide that issue. Upon this consideration they claimed that the judgment of the said Court was not *res adjudicata*.

Mr. Justice Brewer, who rendered the opinion of the Supreme Court, stated the contention of the parties and the conclusions of the Court as to the law applicable thereto in the following language:

> "Our jurisdiction of this direct appeal from the decision of the Circuit Court is invoked on the ground that the case involves the application of the Constitution of the United States.
>
> The contention is that, by Article V of the Amendments to the Federal Constitution, no person can 'be deprived of life, liberty or property without due process of law;' that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that they were deprived of this property by the judgment of the Circuit Court, which gave unwarranted effect to a judgment of

the State courts; that this action of the Circuit Court is not to be considered a mere error in the progress of a trial; but a deprivation of property under the forms of legal procedure. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 51 L. Ed. 979, 17 Sup. Ct. Rep. 581, we held that a judgment of a State court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We said (p. 234 L. Ed., p. 983, Sup. Ct. Rep., p. 584):

> 'But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interetsed the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This Court, referring to the Fourteenth Amendment, has said: "Can a state make anything due process of law, which by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."' Davidson v. New Orleans, 96 U. S. 97, 102, 24 L. Ed. 616, 618.

The * * * same question could be propounded and the same answer should be made, in reference

to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that amendment."

And again (p. 236, 237, L. Ed., p. 985, Sup. Ct. Rep., p. 584):

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law if the necessary result be to deprive him of his property without compensation."

"If a judgment of a State court can be reviewed by this Court on error upon the ground that although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to), a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a State court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental ques-

tion presented in the trial court of the state was the validity of those releases; that, notwithstanding this, that Court came to its conclusion and rendered its judgment without any determination thereof; that the Appellate Courts wrongfully assumed that the trial court had decided the question, and rendered their judgments on that assumption, so that the necessary result of the proceedings in the State courts was a deprivation of the right of the plaintiffs to a share of the estate without any finding of the vital fact which alone could destroy their right. The contention is not that the State courts erred in their finding in respect to this fact, but that there never was any finding. Such decision of the State courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as conclusive determination of the fact. ALTHOUGH THESE PLAINTIFFS WERE PARTIES TO THE PROCEEDINGS IN THE STATE COURTS, AND PRESENTED THEIR CLAIM OF RIGHT, IF IT BE TRUE THAT THE NECESSARY RESULT OF THE COURSE OF PROCEDURE IN THOSE COURTS WAS A DENIAL OF THEIR RIGHTS—A TAKING AWAY AND DEPRIVING THEM OF THEIR PROPERTY WITHOUT ANY JUDICIAL DETERMINATION OF THE FACT UPON WHICH ALONE SUCH DEPRIVATION COULD BE JUSTIFIED—A CASE IS PRESENTED COMING DIRECTLY WITHIN THE DECISION IN 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. Giving effect in the Circuit Court to the State judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully

obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the State proceedings can be sustained or not is a question upon the merits, and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the State courts and the necessary result therefrom. We are of opinion that the jurisdiction of this Court must be sustained."

Your Honors will note and appreciate the significance of the conclusion of the Court, quoted above, in the following language:

> "Although these plaintiffs were parties to the proceedings in the State courts, and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights —a taking away and depriving them of their property **WITHOUT ANY JUDICIAL DETERMINATION OF THE FACT UPON WHICH ALONE SUCH DEPRIVATION COULD BE JUSTIFIED**—a case is presented coming directly within the decision in 166 U. S. 226."

That part of the opinion just quoted is directly applicable to the judgment complained of in this suit.

As we have pointed out in this brief, the St. Louis Circuit Court arbitrarily directed a verdict to be returned against the plaintiff in this case for the royalties claimed, without either the Court or the jury having

determined that the Wagner Company had elected to operate under a license. Until and unless the Wagner Company elected to operate under a license no right to royalties accrued. This was the fundamental issue in the suit. Our petition here alleges that there was no evidence of an election, and that the Court did not in any manner determine that there had been an election. The statement of the case, and the review of the evidence, as they appear in the opinion of the Supreme Court of Missouri, which affirms the judgment, sustain completely the allegation of our petition, that this question of election was never decided.

Such being the facts, the resulting judgment comes within the condemnation of the Supreme Court of the United States, as expressed in the above quotation, where it is said that a judgment rendered "without any judicial determination of the fact upon which alone" it could be sustained, is a deprivation and taking of property without due process of law.

The same doctrine was invoked and approved by the Supreme Court of Illinois, in the case of Hultberg v. Anderson, 252 Ill. 607.

This was a suit brought to annul a prior decree between the same parties. In that case the Supreme Court of Illinois said:

> "Plaintiffs in error do not contend that there was a want of jurisdiction of the person of Anderson in the proceeding wherein he was adjudged to pay $232,200 to Hultberg, but their contention is that there is another class of judgments which may be wanting in due process of law, notwithstanding the Court rendering such judgment has complete jurisdiction both of the subject matter and of the

person of the parties concerned, and that the case at bar belongs to that class.

Under the due process clause of the Constitution a party is not only entitled to notice of the proceedings against him, but he is also entitled to be heard in his defense. Of what avail is it to summon a party into court if after he appears the Court arbitrarily refuses to hear him? A JUDGMENT PRONOUNCED WITHOUT ANY JUDICIAL DETERMINATION OF THE FACTS WHICH ALONE CAN SUPPORT SUCH JUDGMENT IS MERELY THE ARBITRARY EDICT OF THE JUDGE, AND IS AS MUCH WANTING IN DUE PROCESS OF LAW AS THOUGH THE PARTY AGAINST WHOM IT IS ENTERED HAD RECEIVED NO LEGAL SUMMONS.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Fayerweather v. Ritch, 195 U. S. 276."

In an earlier case, that of Windsor v. McVeigh, 93 U. S. 274, the Supreme Court had occasion to point out the limitations upon the power of a Court, and to emphasize the fundamental principles, that when a Court exceeds its powers, it then acts without or beyond its jurisdiction, and its action is void.

That case was an action in ejectment to recover certain real estate in Alexandria, Virginia. Suit was brought in the State Court, and from there taken to the Supreme Court of the United States. The plaintiff was entitled to recover, unless his title was destroyed by a judgment in condemnation brought to confiscate his property, because of the fact he held a position of honor and profit under the Confederate government. The

defendant's title was founded upon a sale under this judgment of condemnation. The condemnation proceedings had been brought by the United States, and due notice was had by publication. In response to the notice plaintiff appeared by counsel and filed an answer which answer was, upon motion of the United States, stricken from the files, because of the fact that at the time of its filing the plaintiff was in the service of the Confederacy, and in the Confederate lines. The Court then proceeded to judgment, condemned the property and had it sold.

The Supreme Court in this situation held that the judgment of condemnation was a nullity. The Court saying that the refusal of the condemning Court to permit the defendant to answer after having been notified, was in effect a withdrawal of the notice as to him, and in consequence was equivalent to one without notice at all. To the contention made by the Government that as the Court had jurisdiction of the party and of the res, and that consequently its action in striking the answer from the files was merely erroneous, the Court said:

> "The doctrine invoked by counsel, that, where a Court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is, undoubtedly, correct as a general proposition; but, like all general propositions, is subject to many qualifications in its application. All Courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to

transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments.

Norton v. Meader, 4 Sawy. 603, Circuit Court of California.

Though the Court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the Court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the Court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the Court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the Court in rendering them would transcend the limits of its authority in those cases."

And again the Court said:

"So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the Court, without the intervention

of a jury, would be invalid for any purpose. The decree of a Court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceedings of the Chancellor. And the reason is that Courts are not authorized to exercise their power in that way."

The application of these principles to the case in hand will be seen, when your Honors keep in mind these facts as alleged in our petition:

1. The St. Louis Circuit Court proceeded to fix a liability on the plaintiff in this case, without having determined that the Wagner Company had elected to operate under a license.

2. There was no evidence whatever that the Wagner Company had so elected, which election was a prerequisite to its liability to pay royalties.

3. The St. Louis Circuit Court, by its peremptory instruction to the jury, which is set out in our petition, declared that the Wagner Company was bound absolutely to pay the royalties—that is, that its liability was not dependent upon its having elected to operate under a license.

4. In so deciding the St. Louis Circuit Court determined an issue, and predicated its judgment upon a finding which was not embraced in any issue made by the litigants in that case. In other words, the plaintiff in that case had not claimed that the Wagner Company had itself bound absolutely to pay these royalties, but had claimed that the Wagner Company had been granted a right of election and had elected to operate under a license, and had thereby become bound to pay the royalties.

We assert that the law is, that the parties are bound by their pleadings. We assert, too, that a court can only try the issues made by the pleadings. We assert, also, that when a court attempts to decide something not made an issue by the pleadings, it exceeds its jurisdiction. This is pointed out in Windsor v. McVeigh, above quoted. It is also pointed out by Judge Trieber in U. S. v. Goldsmith, 271 Fed. 845. If, as is alleged in our petition, the Wagner Company in that case was summoned into court to meet the charge that it made a contract giving it the right to elect to operate under a license, a further charge that it had exercised its option and had elected to operate under a license, and thereby had become bound for the royalties, it was entirely beyond the jurisdiction of the trial court to adjudge that it had entered into a contract, not described in the petition, under which it became bound absolutely (the language of the Court's instruction) to pay the royalties, regardless of the fact of election. No such claim as this had been made in Lyndon's petition. There was nothing in any of the pleadings to advise the Wagner Company of such a claim. There was nothing in the pleadings upon which such a claim could be submitted to the Court, and the Court had no more power to decide such a question than it would have had to adjudge the Wagner Company liable for the purchase price of this patent, without the plaintiff having claimed that the Wagner Company had agreed to purchase the patent.

When the Court departed from the pleadings, and founded its judgment upon a claim not embraced within the pleadings, its action was, in the eyes of the law, arbitrary. And the arbitrary character of this judgment is emphasized when your Honors consider that

there was nothing in the contract justifying such a view; that there was no evidence that the Wagner Company had ever elected to operate under a license, but that, on the contrary, the Wagner Company had never made or sold a machine (covered by the patent), and had never elected, either to purchase the patent or to operate under a license from the patentee.

In this state of facts, the language of the Supreme Court of the United States, in Interstate Commerce Commission v. L. & N. R. R., 227 U. S. 88, is pertinent.

In that case the Court had under consideration the validity of an order of the Interstate Commerce Commission fixing rates. The Court said:

> "On the appeal here, the Government insisted that while the Act of 1887 to regulate commerce made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906, that rates should be set aside if, after a hearing, the 'Commission should be of the opinion that the charge was unreasonable.' In such case it insisted that the order based on such opinion is conclusive and (though Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.
>
> 1. But the statutes gave a right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. **A finding without evidence is arbitrary and baseless. And if the Government's contention is cor-**

> rect it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that where rights depended upon facts, the Commission would disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficiently, exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary execution of power."

In Hutts v. Martin, 134 Ind. 587, the Supreme Court of Indiana said:

> "It is a general principle of law that courts have no power to adjudicate matters not involved in the issues in causes pending before them. Litigants do not place themselves for all purposes under the control of the Court, and it is only the interests involved in the particular suit that can be affected by the adjudication. OVER OTHER MATTERS THE COURT HAS NO JURISDICTION, AND ANY DECREE OR JUDGMENT RELATING TO THEM IS VOID."

In Munday v. Vail, 34 N. J. Law 418, the Supreme Court of New Jersey said:

> "The inquiry is, had the Court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the Court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties

must be present; and, third, the point decided must be, in substance and effect, within the issue. That a Court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration, and yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a Court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the Court, and it is only over these particular interests which they choose to draw in question, that a power of judicial decision arises."

And again:

"A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard."

The decisions referred to emphasize the rule that courts, as well as every other human institution, are limited in their powers. As pointed out in Windsor v. McVeigh, courts cannot act without written pleadings. Written pleadings are necessary to the jurisdiction of the Court. It is pointed out in the opinion in that case that if a Court undertook to render a judgment upon

oral pleadings, its judgment would be void, because beyond the jurisdiction of the Court. From this it follows that the judgment must be based upon the pleadings, and cannot go beyond them. To illustrate this rule, the Court points out that in a suit on a promissory note the Court could not enter a judgment for the possession of real estate. And it is perfectly plain that upon a charge of burglary a man could not be convicted for manslaughter. These are extreme illustrations, but they serve to make clear to the mind the proposition that a Court is constituted only to decide the particular complaint that is lodged with it. It has no jurisdiction or authority to decide any other. In this case the particular complaint was that the Wagner Company, by a contract, had been granted a right to elect to operate under a license, in which event it obligated itself to pay certain royalties. The particular complaint of this case further was, that it had elected to exercise its right of election, and had become bound to pay these royalties. When the evidence was introduced, there was no evidence to sustain the particular complaint, that it had exercised the right of election. On the contrary, the evidence clearly showed that no such election had been made. The St. Louis Circuit Court thereupon disregarded the complaint upon which its judgment had been invoked, and, having the parties before it, arbitrarily instructed the jury that the Wagner Company had made a contract, under which its obligation to pay the royalties was absolute, and required the jury to return a verdict for the full amount claimed. This, we say, upon the authority of the cases above referred to, was arbitrary, and beyond the power of the Court, and the resulting judgment was a nullity.

It was a nullity for other reasons. It was a nullity because, as we have pointed out, there was no evidence whatsoever, or pretense of any evidence that the Wagner Company had elected to avail itself of the license privilege of the contract. The burden was upon Lyndon to produce evidence of his claim set up in his petition, that the Wagner Company had elected to avail itself of the license privilege of the contract. He wholly failed to sustain this burden. On the contrary, the evidence showed that the Wagner Company had not elected to operate under a license.

Now it is fundamental that (absent default of a defendant) no judgment can be entered by a court without evidence to sustain it. As stated by the Supreme Court of the United States in Interstate Commerce v. L. & N. R. R., 227 U. S. 88, quoted above:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct it would mean that the Commission had a power possessed by no other officer, administrative body or tribunal under our Government. It would mean that, where rights depend upon facts, the Commission could disregard all rules of evidence and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The judgment was a nullity for still another reason, namely, because by the Court's action in giving a peremptory instruction the defendant in that suit was

deprived of its right to a trial by jury upon an allegation of fact which it disputed. Lyndon in his petition had alleged that the Wagner Company had elected to operate under the license provision of the contract. The Wagner Company denied this allegation. Here was an issue of fact. The result depended upon the decision of this issue. Upon this issue of fact the defendant had a right to the verdict of a jury. Now, conceding that there are circumstances under which an instructed verdict may be rendered, certainly this is a case where it was beyond the power of the Court to direct a verdict. Here the question was: Had the Wagner Company elected to operate under the exclusive license provision of the contract? That was a question of fact. The Wagner Company denied that it had so elected. The plaintiff had not only failed to produce any evidence of such an election, but, on the contrary, the only witness that the Wagner Company had, testified positively and unequivocably that it had not so elected. In this situation the Wagner Company had the right, if it chose, to have a jury pass upon that question of fact. It was beyond the power of the Court to take that right away from the Wagner Company. The right of trial by jury is preserved both by the Constitution of the United States and by the Constitution of the State of Missouri. Such being the fact, there can be no "due process" and no "equal protection of the law" in a case where the unsuccessful litigant is deprived of the right to have a jury pass upon a disputed question of fact which is vital to the renditio nof a judgment in the case.

The Missouri constitutional provision referred to is to be found in Section 28 of Article II, and is as follows:

"The right of trial by jury as heretofore enjoyed shall remain inviolate."

In giving effect to this constitutional provision the Missouri Appellate Courts have said:

"Ordinarily, where plaintiff produces parol evidence to support his action, the issue of fact should be submitted to the jury. The evidence may be all one way, yet it is for the jury to say whether they believe the witness or not." Mineral Land Co. v. Ross, 135 Mo. 101, *l. c.* 107.

In Staehlin v. Major, 199 S. W. 427, the St. Louis Court of Appeals, in treating of a case where a peremptory instruction had been given, said:

"But it is earnestly contended that the Court committed reversible error in peremptorily directing a verdict for plaintiff, and we regard it as quite clear that this contention must be upheld. The allegations of the petition were denied by the answer, and the burden of proof rested upon plaintiff, who, to make out his case, relied upon oral testimony not admitted to be true. That under such circumstances **a trial court is without power** to peremptorily direct a verdict in favor of the party having the burden of proof, is a rule of decision firmly established in this State. Such has been the law of this State since the decision of the Supreme Court in the early case of Bryan v. Wear *et al.*, 4 Mo. 106. It is unnecessary to collate all of the many later cases which are to this effect.

* * *

The credibility of the witnesses, and the weight to be given to their testimony is, in the first in-

> stance, exclusively for the jury. The Court cannot require the jury to believe the witnesses although no countervailing testimony be offered. And under such circumstances as are here presented, the giving of a peremptory instruction to find for the plaintiff is an **invasion of the province of the jury, and constitutes a denial of the right to a trial by jury.**"

In an earlier case, that of Troll v. Home Circle, 161 Mo. App., at page 722, the same Court had said:

> "Now, under the practice in this State **it is beyond the power** of a trial court to direct a verdict in favor of the party having the burden of proof where, as here, the issue of fact is controverted and oral testimony, not admitted to be true, must be relied on in proof thereof. Such a direction under these circumstances is an invasion of the province of the jury and a denial of the right to a trial by jury."

The foregoing excerpts correctly represent the state of the law in Missouri. The rule announced by them must be and is, due process in the administration of justice in the courts of that State. That rule is enforced by the constitutional provision quoted. The rule must be applicable to all litigants. To deny the benefits of that rule to one litigant is, as to him, a denial of due process and a denial of the equal protection of the law. It is an invasion of the fundamental right of trial by jury. It is an act beyond the power of the Court, and as the judgment derives its only force and effect through the arbitrary action of the Court, in directing the jury to return the verdict upon which it

is based, the judgment is void—void because founded upon an act which was beyond the power of the Court.

With respect to this right of trial by jury, the Supreme Court of the United States in Hodges v. Easton, 106 U. S. 408, has impressively said:

> "It has been often said by this Court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

In 24 Cyc. 174 the import of the decisions upon this subject is thus stated:

> "The right of trial by jury is one which should be carefully guarded against infringement; and the constitutional provisions are uniformly construed to the effect that it cannot be denied in cases where it existed at the time of the adoption of the Constitution or in similar classes of cases arising under statutes subsequently enacted; nor can the exercise of the right be made subject to such conditions and restrictions as unreasonably to impair it."

And we say to your Honors that this invalidity of the judgment was in no wise mitigated by the subsequent action of the Supreme Court of Missouri.

The Supreme Court of Missouri has two divisions. Under the Constitution of Missouri each division sits separately for a hearing of all cases taken to that court on appeal. Division No. 1 has four judges, and Division No. 2 has three judges. If upon a hearing before a division any one judge dissents from a judgment of

his division, the case, under the Missouri Constitution, is automatcally transferred to the Court en banc.

When this case came on for hearing in Division No. 1, at which hearing the oral arguments were made, Judge Woodson, who was a member of that division, was absent. Subsequently Judge Woodson wrote the opinion of the court and participated in the decision, although he had not been present at the hearing of the case.

The plaintiff's petition shows that never before in the history of the court had a judge of that court participated in a decision without having been present at the hearing.

Our contention is that we had a right to a hearing before Judge Woodson; that by his participating in the decision without having been present at the hearing, we have been denied the equal protection of the laws and due process of law.

We claim that we have bene denied the equal protection of the law, because as to all other litigants, the right of an oral hearing before all who participate in the decision has always been recognized.

We claim that we have been denied due process of law, because a hearing, or an opportunity for a hearing, is a requisite of due process.

We submit that the right to be heard before judgment is a fundamental principle of the laws of the English speaking people. It is a right not specifically mentioned in the Constitution of the United States or the Constitution of the State of Missouri. But it is a right of so ancient and universal recognition that it must be accepted as a necessary element of due process.

A trial or a hearing in English jurisprudence contemplates the presence of the parties in person or by representative, and an oral presentation of facts and arguments. The oral presentation may be waived, but historically speaking, the right to it has never been denied—at least without rebuke from the courts of last resort.

The Courts have repeatedly held that "due process" necessarily includes reasonable notice of the institution of judicial proceedings, and a reasonable opportunity to be heard. Thus in

L. & N. Ry. Co. v. Schmidt, 177 U. S. 238

the Supreme Court of the United States, in speaking of the Fourteenth Amendment, said:

> "All its requirements are complied with, provided, in the proceedings which are claimed not to have been due process of law, the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend."

And in

Simon v. Craft, 182 U. S. 436

the same Court said:

> "The essential elements of due process of law are notice and opportunity to defend."

And in

Turpin v. Lemon, 187 U. S. 51,

the United States Supreme Court quotes from Justice Field's opinion in the case of Hager v. Reclaimant Dis-

trict, 111 U. S. 701, where he said, speaking of the Fourteenth Amendment:

> "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; **and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought.** The clause in question means, therefore, that there can be no proceedings against life, liberty or property which may result in the deprivation of either, without observance of those general rules established in our system of jurisprudence for the security of private rights."

The term "due process" (as guaranteed by the Fourteenth Amendment) has no statutory or constitutional definition. Its meaning has to be arrived at through consideration of the historical development of our jurisprudence, and the political and ethical conceptions of the English speaking peoples.

Thus viewed one cannot escape the conviction that there is no right more jealously guarded by our laws, more firmly imbedded in our system of political rights than the right to a hearing before judgment. And the right to be heard, as stated before, includes the right to personal presence and oral presentation.

Can your Honors conceive of a defendant being deprived of his liberty or his life, without first being accorded the right of oral argument before a jury? A

denial of such a right would be a denial of due process. Many Courts have so held.

In the case of Douglas v. Hill, 29 Kans., *l. c.* 528, the Supreme Court of that State announced its conclusions in the following language:

> "A party to a lawsuit has a right to be heard, not merely in the testimony of his witness, but also in the arguments of his counsel. It matters not how weak and inconclusive his testimony may be, if it is enough to present a disputed question of facts upon which he is entitled to a verdict of the jury, he has a right to present in the arguments of his counsel his views of the case. This is no matter of discretion on the part of the Court but an absolute right of the party. * * * Limiting the time of an argument and refusing to permit any argument at all are entirely different matters. The one is the exercise of a discretion, the other is a denial of a right."

The same rule of law has been applied to hearings before appellant tribunals. This is illustrated by the case of

Devoit v. McGerr, 14 Colo. 577.

That was a case which involved the validity of a decision rendered by commissioners appointed to assist the Supreme Court in its work. The oral argument of that particular case had been before the commissioners and not before the Court. In disposing of the case the Court said:

> "It is proper, therefore, to state that this Court is now and always has been, of the opinion that

it cannot discharge its constitutional obligations to litigants by the promulgation of any opinion, by whomsoever prepared, without first being satisfied of the correctness of the opinion in all substantial particulars; and also that the privileges of being heard orally before the Court prior to final judgment is a right which, though subject to reasonable regulation by the Court, cannot justly be denied to any party litigant making reasonable application therefor. 'Hear before you strike' was a maxim of the ancient jurists."

In 2 Ruling Case Law, p. 172, it is said:

"The parties, as a matter of right, are usually entitled to a personal hearing for the argument of the case when proper request is made therefor, but the exercise of this privilege is subject to reasonable regulations by the Appellate Court, and, like any other privilege, may be waived."

And again:

"While argument of the case in the first instance on appeal is a matter of right, re-arguments are directed for the satisfaction of the Court alone, and are altogether subject to its discretionary control and direction."

The Supreme Court of Massachusetts, in the case of Wall v. Old Colony Trust Co., 177 Mass., *l. c.* 277-278, used the following language:

"But the case presents no question of this kind, for this Court never has attempted to deprive anyone of the right or privilege of arguing orally.

> Not only are oral arguments always heard before a quorum of the Court, unless such arguments are expressly waived, BUT COUNSEL MAY, IF THEY CHOOSE, SECURE A RIGHT TO BE HEARD ORALLY BEFORE ALL THE JUSTICES WHO PARTICIPATE IN THE JUDGMENT, if for any reason it becomes necessary, as it sometimes does, for other justices to be called in in order that the judgment may be concurred in by a majority of the whole Court."

And in California it has been recognized that counsel should have an opportunity to orally present his case to each judge who participates in the decision; in the case of Fair v. Angus, 57 Pacific 385, holding that where a judge has not heard the argument AND IT IS DEEMED IMPORTANT THAT ALL THE JUDGES SHOULD PARTICIPATE IN THE DECISION, the submission of the appeal will be set aside, with leave to counsel to stipulate to re-submit the case on the briefs and printed arguments already on file.

While in the opinion of the Massachusetts Court just quoted, the Court did not say that oral argument of a cause in that court is a RIGHT protected by the Constitution, yet, nevertheless, by saying that the Court has NEVER attempted to deprive anyone of such right, it recognized oral argument as invariably a part of prescribed appellate practice in that State, which, in effect, would make it an element of due process under the laws of that State.

By Section I of the Amendment of 1890 to Article VI of the Constitution of the State of Missouri (refer-

ring to the two divisions of the Supreme Court), it was provided:

> "The divisions shall sit separately for the HEARING and disposition of causes and matters pertaining thereto."

Here is an express constitutional recognition of the right to a HEARING, and, we assert with confidence the word HEARING as thus used, means an oral hearing; that there would be no occasion for the division to "sit separately" if causes were to be disposed of upon printed briefs and arguments.

And again, the right to an oral argument before the Supreme Court of Missouri is recognized and provided for by Rule 29 of that Court (to be found on the back of the current reports of the Supreme Court of Missouri), which is as follows:

> "Rule 29. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceeding, and fifty minutes for respondent or defendant in error, or respondent in original proceeding."

So here we have a constitutional recognition of the right to oral argument, made effective by rule of the Court. And—if oral argument is a right—then it is a right to be heard by all the judges who participate in the decision. If it is a RIGHT, it has a REASON behind it. The REASON is to be found in the consideration that the litigant may, by oral argument, more adequately inform the judges who are to decide his case, of the matters and things to be considered in reaching a decision. This reason is just as potent with respect to

one judge as it is to the other three judges. If (as certainly is contemplated) the opinion and judgment of three of the judges may be influenced by an informative and persuasive presentation, so likewise may the opinion of the fourth judge be also influenced.

And, aside from the theoretical aspects of the determination of questions of law and fact by appellate courts, we know, from experience, that in many cases the judges do not agree among themeslves in the initial stages of reaching a judgment, and that one judge has an influence upon the views and conclusions of the other judges.

And, as the Courts have regard for the substance and realities of things, as distinguished from mere forms and abstractions, the right of the litigant to the opportunity to rightly influence the opinion of each and every judge who participates in the decision, should be scrupulously protected and enforced.

This is of peculiar importance under the Constitution of the State of Missouri, for by Section 4 of the Amendment of 1890 to the Constitution of Missouri, it is provided as follows:

> "Section 4. Cause transferred to court en banc —when—When the judges of a division are equally divided in opinion in a cause, or WHEN A JUDGE OF A DIVISION DISSENTS FROM AN OPINION THEREIN * * * the cause, on the application of the losing party shall be transferred to the Court for its decision."

Under this provision of our Constitution, therefore, if Judge Woodson, who wrote the opinion in this case,

had reached a contrary conclusion, petitioner would have had the RIGHT to have the case transferred to the Court en banc and a hearing had therein on the entire case. And who can say that if Judge Woodson had heard the oral argument of this case, he would not have reached a different conclusion from that disclosed by his official opinion.

The case of Shaw v. People, 3 Hun. (N. Y.) 281, gives emphasis to the obvious answer to this question.

In the State of New York there is a statute which provides:

> "How can any judge decide or take part in the decision of any question which shall have been argued in the court when he was not present and sitting therein as a judge."

(And in passing, it may be said that the statute referred to is but an expression of the fundamental principles which we claim are inherent to our jurisprudence.)

In the case last referred to, the Court was called upon to consider the effect of the temporary absence of one of the judges of one of the New York courts during the progress of a trial. The court was composed of four judges. On one of the days of the trial, one of the judges absented himself. He returned the next day and continued to participate in the trial. The Court said:

> "Certainly their (the three judges who were present all the time) understanding and intellects were better prepared by reason of having heard the whole evidence, than was Steere's who had not

heard the evidence taken on Monday when he was absent from the court house. His vote and voice upon any question arising upon the trial after his return, may have produced a different result from what they would, had he remained during the whole trial, heard the whole evidence, and given his reflective judgment to it, prefatory to voting and speaking in the deliberations which ensued after his return to the bench, which he had, so far as the facts of the trial which took place on Monday, vacated and abandoned. It is not for us to speculate, in a case where the life of a prisoner is involved, as to the extent of the influence of the vote and voice of one who has not heard the whole evidence. The prisoner is entitled to the full benefit of the understanding and judgment of those who take part in the judicial deliberation which affects his life. He is entitled to all the forms of law, to all the provisions of the Constitution by which his rights are secured."

It is not impossible that Judge Woodson's opinion in the present case might have been influenced by the oral argument and presentation of this case. If he had reached a differtnt conclusion, it is not impossible that his views would have had an influence on the opinions of the other judges. It is evident that he took a leading part in the decision of this case, for to him was delegated the duty of investigating the record and writing the opinion of the Court. Your Honors know how important in the decision of a cause, is the opinion of the judge to whom is assigned the task of examining the record and writing the opinion of the court. Your honor may know that in many in-

stances the other judges do not examine the records and the qutstions involved with the same care and sense of responsibility that is exercised by the judge to whom the assignment is made.

At any rate, under the provision of the Constitution of the State of Missouri above quoted, it is clear that if Judge Woodson had reached a contrary conclusion, the result would have been a transfer of this cause to the court en banc for a hearing before the whole court, and a decision of the case by seven judges instead of four.

There is another consideration here to be taken into account. Insofar as we have been able to investigate, we have been unable to find that ever before in the history of the Supreme Court of Missouri, has a judge participated in the decision of a cause unless he was present at the oral argument. An examination of the reports discloses innumerable instances where, for various reasons, individual judges are marked as "not sitting." They may be absent because disqualified, or from reasons of convenience or necessity. But when they are absent, the record invariably discloses that they do not participate. The present case, so far as we have been able to ascertain, is the only case in the history of Missouri where a judge who was not present at the oral argument had participated in the decision and written the opinion of the Court.

Assuming this to be a fact, we then submit that by the action of the Court in this case, we have been deprived of a right which has uniformly been accorded to all other litigants—that is, the right to an oral argument before all the judges who participate in the deci-

sion. And in being thus discriminated against we have been denied the equal protection of the law, guaranteed by the 14th Amendment.

The answer to our complaint about the participation of Judge Woodson, without having, as to him, been accorded the right of oral argument, must be found largely in the fundamental conception upon which the judicial systems of the English speaking peoples are founded. There is implanted in that race, and, indeed, in all races, intuitive thought, that a man has not been given a square deal unless he has been given full opportunity to be heard. In response to this intuitive thought, those who have been able to control the jurisprudence of the English speaking peoples have jealously guarded and assured the right to a hearing. The full right to a hearing has thus become implanted as one of the sacred ingredients of "due process" and "equal protection of the laws."

The guaranty of due process and the equal protection of the laws has been written into the Constitution of the United States. The State Courts, inadvertently, have at times denied to litigants the rights guaranteed by the Constitution of the United States. When this occurs, and when the Courts of the United States—that is, the Federal Courts—are applied to, they, as the repositories of the judicial power of the Federal Government, are under a sacred duty to see that the constitutional guaranty of due process is made effective. They should exercise their power to protect these fundamental rights without timidity, for it is of vastly more importance that the fundamental guarantees of the Constitution of the United States should be clearly and firmly established and maintained, than the State

Courts should be absolved from implied criticism. If these fundamental guarantees are to be made of value in the life of the individual and of the nation, they must be clearly defined and at all times available, and not obscured by invocation of doubtful distinctions and exceptions.

With respect to our contention that Judge Woodson's participation in this decision, under the circumstances described, constituted a denial of due process and a denial of the equal protection of the laws, we have to admit there are not many available decisions; but with respect to our contention that the initial decision of the trial court was invalid, because rendered without a determination of the point, without which no liability could be imposed upon the Wagner Company (to-wit, its election to take a license from Lyndon), we assert with confidence that under the decision of the Supreme Court of the United States, in the Fayerweather will case, and the principles of law there announced, that there can be but one answer, and that is, that our contention in this respect is well founded.

Both the District Court and the United States Circuit Court of Appeals failed to apply the principles which are treated of in the foregoing argument. With respect to our contention that the State Court exceeded its power, when it refused to determine, or to permit the jury to determine, the one question of fact upon which alone the judgment, under the pleadings, had to depend, both the District Court and the Court of Appeals were of the opinion that such failure was mere error, to be corrected only upon appeal to the State Supreme Court.

Our answer now, and our claim always has been, that what the State Court did was beyond its power or jurisdiction, and that when a Court exceeds its jurisdiction and power its act is a nullity. It is not error. The act becomes a nullity when it exceeds the power of the Court performing it. The judgment becomes a nullity, because the Court had no power to enter such a judgment in the case then pending before it. When it did so, and attempted to take petitioner's property through the power of an execution, founded on a void judgment, such taking became a taking without due process of law.

We, therefore, earnestly pray that the writ of certiorari may be awarded, so that the questions involved may come before this Court either on the appeal which has been heretofore prosecuted, or by certiorari, as the Court may determine is the proper remedy.

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WAGNER ELECTRIC MANUFACTURING COMPANY *v.* LYNDON ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 738. Motion to dismiss submitted April 30, 1923.—Decided May 21, 1923.

1. Where the District Court dismissed a bill on the ground that the constitutional questions relied on were too unsubstantial to confer jurisdiction, without passing on defendant's further objection that the bill sought to enjoin proceedings in a state court contrary to Jud. Code, § 265, the only appeal allowed by law was to this Court under Jud. Code, § 238, on the ground that the sole issues involved were those involving the application or construction of the Constitution or the jurisdiction of the District Court. P. 230.
2. The Act of September 14, 1922, c. 305, 42 Stat. 837, providing that, if a case is taken, by appeal or writ of error, to the Circuit Court of Appeals, which should have been taken to this Court, the appeal or writ of error shall not for that reason be dismissed, but shall be transferred to the proper court and there be disposed of as if the appeal or writ of error had been properly taken, was applicable to a case in which the Circuit Court of Appeals had rendered a final decree of affirmance before the date of the act, but which remained pending before that court on a petition for rehearing. P. 230.
3. When a case from the District Court which should have been brought here directly was taken to the Circuit Court of Appeals, and then, by appeal from its decision, to this Court, and here submitted for decision on the merits, by a motion to dismiss or affirm and accompanying briefs, *held*, that it was not necessary to remand it to the Circuit Court of Appeals for transfer under the Act of September 14, 1922, *supra*, but that it might be treated as though it had been so transferred. P. 231.
4. The proposition that, in a collateral attack upon the validity of a judgment of a state court, a federal court can examine the evidence to see whether a direction by the court to a jury to find a verdict was justified by the evidence, is frivolous. P. 231.

5. The deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. P. 232.
6. When the state constitution provides that a court shall consist of four judges and that a majority thereof shall constitute a quorum, and review by four judges is given, and an opinion is rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument but wrote the opinion on the printed arguments, is at most an irregularity which does not affect the validity of the judgment. P. 232.
7. Where the state constitution provided for a court in two divisions, and a case was disposed of by one of those divisions, and the losing party's motion to transfer the case to the court in banc, because a federal question was involved and it was therefore under the state constitution entitled to a hearing by the full court, was denied, and the propriety of the decision in the state court was questioned in the federal court on this ground, *held*, that the question of the right to the transfer was one of state law upon which the federal courts were bound to accept the decision of the state court. P. 232.
8. When the history of the case and the conduct of the appellant left no doubt that the litigation and successive appeals were prosecuted solely for delay and the case was dismissed by this Court for lack of jurisdiction because the grounds of appeal were frivolous, the appellee was awarded $1,500 as damages for delay, and costs, as upon an affirmance of the decree of the District Court. Rev. Stats., §§ 1010, 1012. P. 232.

Appeal to review 282 Fed. 219, dismissed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decision of the District Court which dismissed the bill in a suit to hold a sheriff as trustee of money paid under an execution issued on a judgment of a state court, and to enjoin him from paying it to the judgment creditor, Lyndon, and the latter from receiving it.

Mr. Charles A. Houts, Mr. Albert Blair and *Mr. Thomas J. Cole* for appellant.

Mr. Lawrence C. Kingsland, Mr. John D. Rippey and *Mr. Clarence T. Case* for appellees.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a motion to dismiss or affirm by the appellees in an appeal from the decree of the Circuit Court of Appeals of the Eighth Circuit.

The record discloses the following:

On May 10, 1917, the appellee Lamar Lyndon brought suit in the Circuit Court of the City of St. Louis, Missouri, against the appellant, the Wagner Electric Manufacturing Company, to recover royalties on a patent owned by Lyndon alleged to be due under a contract between the parties. A trial before a jury was had, in which evidence was introduced by both sides, and at the close of all the evidence, the court directed a verdict for the plaintiff, and judgment followed for $12,029.50. The Wagner Company appealed from this judgment to the Supreme Court of Missouri, where it was duly assigned for hearing in Division No. 1 of that court under a provision of the constitution of Missouri that the Supreme Court shall consist of seven judges and shall be divided into two divisions, one to consist of four judges known as Division No. 1, a majority thereof to constitute a quorum and its judgments as to causes and matters before it to have the force and effect of law. On January 21st, the appeal was argued before three of the judges of Division No. 1, and printed arguments were filed by both parties. Judgment was subsequently rendered by the four judges, the opinion being written and filed, with the concurrence of the other three judges, by Judge Woodson of the Division. Judge Woodson had not heard the oral argument. The Wagner Company filed a motion for rehearing and a motion to transfer the cause to the court *in banc*, which were denied.

The Wagner Company then applied to this Court for a writ of certiorari to review the judgment of the Mis-

souri Supreme Court, which was denied in April, 1921. *Wagner Electric Mfg. Co.* v. *Lyndon,* 256 U. S. 690. Thereafter on a mandate from the Supreme Court of Missouri, the State Circuit Court issued execution against the Wagner Company on the judgment. The sheriff made a levy on the real property of the Wagner Company, which filed a bill in the United States District Court for the Eastern District of Missouri, against Lyndon and the sheriff, seeking an injunction against their proceeding with the execution. Application for a preliminary injunction on this bill was denied by the District Court. The Wagner Company then paid the judgment and costs amounting to $15,015.29 to the sheriff, and at once brought the present bill in the United States District Court against Lyndon and the sheriff seeking to hold the sheriff as trustee in his custody of the fund, and to enjoin him from paying the money to Lyndon, and Lyndon from receiving it. The jurisdiction was asserted on the ground that the case was one arising under the Constitution of the United States. The District Court heard the case and dismissed the bill. The Wagner Company then appealed to the Circuit Court of Appeals which affirmed the decree of the District Court.

The grounds urged in behalf of the relief sought in the District Court, the Circuit Court of Appeals and this Court were, first, that the action of the Circuit Court of St. Louis in directing a verdict for plaintiff without evidence to warrant such action, deprived the defendant, the Wagner Company, of its property without due process of law and denied it the equal protection of the laws; second, that the action of Division No. 1 of the Missouri Supreme Court in hearing the case on appeal with three judges and allowing a fourth, who did not hear the oral argument, to take part in the decision and write the opinion, and the refusal of Division No. 1 of the Supreme Court of Missouri to transfer the cause to be heard by

the Supreme Court *in banc*, as required by the law of Missouri when a federal question is involved, deprived the Wagner Company of its property without due process of law and denied it the equal protection of the laws.

Defendant Lyndon moved to dismiss the complaint because the court was without jurisdiction, there being no substantial federal question and because the bill sought an injunction to stay proceedings in a state court, contrary to § 265 of the Judicial Code. The District Court dismissed the bill on the first ground. No other questions were presented to the District Court. The only appeal from its decision allowed by law was, therefore, to this Court under § 238, on the ground that the sole issues involved were those involving the application or construction of the Constitution or the jurisdiction of the District Court. *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277–281; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 295; *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 73; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co.* v. *City of Raton*, 249 U. S. 552, 553. Such a case could not be taken to the Circuit Court of Appeals and, except for legislation enacted by Congress September 14, 1922, it would have been the duty of that court to dismiss it for want of jurisdiction. Except for that legislation, it would now be our duty to reverse the decree of that court with direction to dismiss the appeal. *The Assessors* v. *Osbornes*, 9 Wall. 567, 575; *Mansfield, C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 388–389; *Blacklock* v. *Small*, 127 U. S. 96, 105; *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 73; *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318; *The Carlo Poma*, 255 U. S. 219, 220–221.

The legislation of September 14, 1922, referred to (42 Stat. 837, c. 305), provides that if an appeal or writ of error has been or shall be taken to, or issued out of any

circuit court of appeals in a case wherein such appeal or writ of error should have been taken to, or issued out of, the Supreme Court, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, where it shall be disposed of as if the appeal or writ of error had been properly taken.

The decree of affirmance in the Circuit Court of Appeals was entered on July 7, 1922, but a petition for rehearing was filed and that petition was not denied until September 18, 1922, or four days after the passage of the foregoing act. Before the decree of affirmance became finally the act of the Circuit Court of Appeals, this law came into force, and, however that may be, it is in force now to govern us in the direction which we, in reversing the decree of affirmance, should give to that court. That direction should be to transfer the case to this Court to which it should have been brought by direct appeal from the District Court under § 238 of the Judicial Code.

The case is here on an appeal allowed by a judge of the Circuit Court of Appeals. The case has been submitted to us on the motion to dismiss or affirm which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consumption of time and labor is not in the spirit of the Act of September 14, 1922. Having the case here, and having heard it on the merits, we think we may properly consider that done which ought to have been done, treat the case as here by appeal from the District Court, and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us.

The only grounds urged by the appellant for a reversal of the decree dismissing the bill of complaint are frivolous and without merit. The first involves the proposition that in a collateral attack upon the validity of a judgment

in a state court, a federal court can examine the evidence to see whether a direction by the court to a jury to find a verdict was justified by the evidence. This would be to make such an attack serve the purpose of a writ of error. More than this, even if it were held that the direction deprived the defendant of the right of trial by jury (a holding shown to be erroneous by *Treat Manufacturing Co.* v. *Standard Steel & Iron Co.*, 157 U. S. 674), still the deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the Federal Constitution. *Walker* v. *Sauvinet*, 92 U. S. 90; *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Twining* v. *New Jersey*, 211 U. S. 78, 110, 111; *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211, 217. The second ground is equally unsubstantial. The machinery for review of the judgments of courts of first instance is wholly within the control of the state legislature—*Missouri* v. *Lewis*, 101 U. S. 22, 30—and when the review by four judges is given, and an opinion is rendered by three of them, constituting the quorum, the mere fact that the fourth did not hear the oral argument but wrote the opinion on the printed arguments is at most an irregularity which does not in the slightest degree affect the validity of the judgment. The contention that Wagner was entitled under the Missouri constitution to have the cause heard before a full court because a federal question was involved, is wholly without merit, because the question of the right to transfer was a question of Missouri law upon which we are bound to accept the decision of the Missouri courts. *Missouri* v. *Lewis*, 101 U. S. 22.

We are asked by counsel for appellees to impose a penalty on the appellant for delay. The history of the case and the conduct of the Wagner Company leave no doubt that the litigation in the federal jurisdiction and the successive appeals have been prosecuted solely for delay. Have we power to impose damages in this case?

Section 1010 of the Revised Statutes provides as follows:

"Sec. 1010. Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

Section 1012 has the effect to make § 1010 applicable to appeals in equity. The second paragraph of the 23rd Rule of this Court provides that:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment."

The third paragraph is:

"The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court."

An objection to allowing damages in the present case suggesting itself is that the decree appealed from was not a money judgment. It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the 23rd Rule. Sections 1010 and 1012, Rev. Stats., are, however, not so restrictive and they give this Court power to impose just damages upon the affirmance of any judgment or decree, for delay. *Gibbs* v. *Diekma,* 131 U. S. Appendix clxxxvi.

The case should be dismissed for lack of jurisdiction because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed just as if upon an affirmance. *Deming* v. *Carlisle Packing Co.,* 226 U. S. 102, 109.

We think that damages of $1,500 for delay are not excessive in this case. We, therefore, direct the dismissal

of the appeal with damages of $1,500 and the taxation of costs as upon an affirmance of the decree of the District Court.

Dismissed.